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WOUNDLAND
W REPORTS
1854-64

DICKS & Co.
Binders,
St. John's, N.F.







THE REPORTS, 1854-1864.

DECISIONS

OF THE

Supreme Court of Newfoundland.

ANNOTATED, REVISED, AND EDITED

BY E. P. MORRIS,

OF THE NEWFOUNDLAND BAR, QUEEN'S COUNSEL, BENCHER

OF THE INCORPORATED LAW SOCIETY

OF NEWFOUNDLAND.



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PREFACE TO THE FIRST VOLUME.

THE importance to the legal profession of having in an available form the decisions, which from time to time have been given in our Supreme Court, must be so obvious that it might appear unnecessary to say anything by way of notice or preface to the present work. Since the granting of the Royal Charter, 1825, only one volume of Reports or Decisions of the Supreme Court have been published, namely, in the year 1829, containing the decisions of the years from 1817 to 1828.

I propose that the present series shall consist of about six volumes, embracing all the reported decisions of leading cases of our Courts on points of law and general interest. The present volume, as will be seen by reference, embraces all the reported decisions from 1884 to 1896, inclusive. The second volume, now in the hands of the printer, will contain the decisions from 1874 to 1884, and so on, down to the date when the volume previously referred to was issued, each volume embracing about ten years' decisions.

I have formed the present volume out of such cases as I deemed important and instructive, and omitted such cases only as appeared not important for the current study and practice of the law, and which were only an affirmation of principles long since settled by English Courts.

In the work of revision I have been careful not to abridge any judgment except as to the pleadings or statement of facts, and unimportant as regards the result. The reasoning of the Judge and the authorities cited, no matter how prolix, have in no way been retrenched. In cases where three judgments have been given in the same cause, I have published in full, without any curtailment, the one which in every respect appeared the fullest. In but few cases has a judgment standing alone been abridged.

The head note to each case has been constructed with a view of putting briefly and without unnecessary use of technical phraseology the gist of each decision. My aim has been to furnish the practitioner with reports of our own Courts in such a form that he will readily find the information he requires for ordinary purposes.

No criticism of the work will be more severe than my own, as no one can be more sensible of its manifest imperfections. It was performed during the past year, in odd hours when free from public and professional duties, and at no time have I been able to give to it that undivided and consecutive attention which I should have liked to have bestowed upon it.

If the result should be of use to the profession, and the learning and research of those who preceded us made available, then I shall be amply repaid for the toil and labour expended on the book.

E. P. MORRIS.

ST. JOHN'S, MARCH 18TH, 1897.

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DECISIONS OF THE SUPREME COURT OF NEWFOUNDLAND.

G T. BROOKING *v.* WM. THOMAS.

1854, *January.* HON. SIR F. BRADY, C. J.

Promissory Note—Promise to pay in specie—Tender—Gold Sovereigns—Silver dollars—Legal tender.

The defendant by his promissory note made at Saint John's, Newfoundland, promised to pay to the plaintiff on demand six pounds currency in specie, and on demand made for payment of the said note, tendered to the plaintiff in discharge of the same, five gold sovereigns which the plaintiff refused to accept, claiming to be paid in silver dollars at the rate of five shillings each. It was admitted that sovereigns generally pass current in St. John's at the rate of twenty-four shillings currency each, and that if sovereigns were a legal tender in discharge of the said note, the amount so tendered was a sufficient value.

Upon a special case agreed upon for the opinion of the Court,

Held.—The tender was not a good legal tender nor a sufficient discharge in law of the sum claimed under the note. Under the law of tender sterling money cannot be tendered in discharge of demands in currency until their value in respect of one another is fixed and determined by law.

THIS case was argued upon a special case submitted for the opinion of the Court.

Mr. Robinson stated that this was an action brought by the plaintiff to recover from the defendant six pounds currency on a promissory note by which the defendant promised to pay to the plaintiff at the Bank of British North America, on demand, six pounds currency in specie for value received. The defendant tendered to the plaintiff at the said Bank five sovereigns in discharge of said debt, alleging that the market value of the said sovereign was twenty-four shillings currency. The plaintiff contended that the tender was not a valid one, in as much as there is no law in force in this colony by which any currency value is affixed to the sovereign. The learned counsel submitted that by the law of England the value of the sovereign is fixed at twenty shillings sterling—that for no other amount is the sovereign a legal tender. That it is one of the requisites of money that a certain definite value should be attached to it—

the very object of money being, by the fixity of its value, to distinguish it from any article of merchandize which may, from day to day, vary in its value. The currency rate at which sovereigns have passed in this colony has varied repeatedly within the last few years. Sometimes they were taken for twenty-three shillings and four pence currency, sometimes for twenty-four shillings currency, and sometimes not taken at all. There is therefore no fixed currency value at which, by any custom or usage, they have been taken in this colony. By usage and legal decision the dollar in this country is held to be of the value of five shillings currency, but no usage sufficiently extensive and invariable to constitute a legal rule prevails respecting the currency value of the sovereign. The sovereign therefore *at any* currency value, is in this colony no more than an article of merchandize, and as such, cannot be a legal tender. But, said Mr. Robinson, it may be said that by the terms of the promissory note it is payable in specie, and as the sovereign is specie, therefore sovereigns are a good tender—to which I reply, that the note is for the payment of six pounds, and as five sovereigns are not six pounds, the tender is not sufficient. It will not do to say that five sovereigns are equal value to six pounds currency, for the same may be said of five bags of bread or any other article of merchandize. In Nova Scotia there is an express Act of the Legislature, chap. 83, upon the subject; it enacts “that the several coins hereinafter shall be legal tenders in discharge of any liability or demand—sovereigns at twenty shillings sterling or twenty-five shillings currency,” &c., &c. Now where would have been the necessity of such an enactment in Nova Scotia if the market value of the sovereign were sufficient to make it a legal tender for a particular currency amount, as contended for in this case. It is a matter of little consequence to the plaintiff or probably to the defendant at what currency value the sovereign should be taken, provided it was made a fixed and compulsory payment at that value, but it would be hard that the plaintiff should be compelled to take the sovereign at twenty-four shillings to-day, when tomorrow he may not be able to pass it for more than twenty-three shillings and four pence or perhaps at all.

The Attorney General, for the defendant, said that the real question between the parties under this contract set out in the case stated, was this, viz.: whether it were to tender sovereigns in discharge of an undertaking to pay six pounds currency in specie. The plaintiff insisted that he was entitled to be paid

in silver dollars. The defendant contended that it was competent to him to pay in sovereigns. The rate at which the sovereign was to be paid and received was a subordinate question, but in this case the parties had agreed upon it, in as much as it was admitted by the plaintiff that if sovereigns were a legal tender in discharge of this obligation, the amount tendered was sufficient, therefore, was narrowed in effect to this point—are British gold coin specie? He admitted that in this country there was no law which made any particular coin a legal tender at any specified rate, except British gold and silver coins at their sterling values. But the usage of paying debts contracted in the local currency in dollars at the rate of four dollars to the pound currency was, he thought, sufficiently established to be recognised by a Court of Law. As to what constituted a pound currency, there was no dispute between the parties, but the contract in this case was, not to pay so many pounds currency unqualifiedly—it was special, so many pounds currency, namely, to pay in specie; and if a foreign coin, such as a Spanish dollar, were specie, *a fortiori*, British gold and silver coins must be specie. Assuming that the contract were to pay so many pounds currency unqualifiedly, it would be a question whether there have been a sufficient usage of payment in discharge of such contracts; if sovereigns at twenty-four shillings each to be legally recognised, possibly not, although the usage of payment at that rate was of many years standing, and ought to be established. The present case, however it should be decided, would not definitely determine that question. It was urged that to permit the payment of so many sovereigns as were equal to the six pounds currency would permit the discharge of the undertaking by the payment of bread and other merchandize of equal value. But we so contended, since sovereigns were the specific commodity in which payment was agreed to be made. If their value were not agreed on, that would be a question of fact to be ascertained. He dissented from the proposition as a general one, that a fixity was given to the value of money by stamping particular values on coins, or by making them a legal tender at fixed rates. The value of money fluctuated in proportion to the supply and demand; in other words, the fluctuation of the value of other commodities and the exigencies of trade. The premium on bills of exchange, it was said, might fluctuate, while the value of money was fixed, but in reality the fluctuation in the premium on bills was an index, or nearly so, of the fluctuating value of money. As to the

nominal rate at which the sovereign ought to be taken in payment of currency debts, if its value be adjusted by the relative sterling value of dollars, it would be found to be twenty-four shillings, and no one seemed to be satisfied with that rate. But the question here was, whether they are a description of coin which can be legally tendered in discharge of this obligation.

The Chief Justice delivered the judgment of the Court.

This case came before the Court upon the following special case agreed upon and settled by the counsel for the respective parties.

The defendant, by his promissory note, made at St. John's, promised to pay to the plaintiff, on demand, on the Bank of British North America, in St. John's, six pounds currency in specie, and on demand made, for payment of the said note, tendered to the plaintiff, in discharge of the same, five sovereigns, which the plaintiff refused to receive, claiming to be paid in silver dollars at the rate of five shillings each. It is admitted that sovereigns generally pass current in St. John's at the rate of twenty-four shillings currency each; and that if sovereigns are a legal tender in discharge of the said note, the amount so tendered was sufficient in value.

1st. Whether or not the plaintiff is entitled to be paid the amount of the said note in dollars; and if not, 2ndly, whether the tender of five sovereigns was a sufficient discharge of the amount due thereon.

The question for our consideration in this case is, whether a tender of five sovereigns be a legal tender for a debt of six pounds currency, payable in specie in St. John's, or in other words, whether the sum of five pounds in sterling money be a valid tender for six pounds currency? The Attorney General contended that the tender was valid in law, while Mr. Robinson insisted that it was not, and we are of opinion that in law the defendant cannot rely upon that tender in discharge of the sum which the plaintiff claims to recover in this action. The debt in this case could only be discharged by a tender in specie by the express terms of the contract, which means gold or silver coin in contra-distinction to paper money, and the specie so tendered must be in value what the law declares to be an equivalent for the amount of the debt demanded. In this country we have specie of other countries current in reference to two different standards, and under two different denominations, viz.: sterling, and what is denominated currency. Sterling is the English current coin, and under that denomination the sover-

eign and other English coins represent in this country their respective legal values in sterling. Currency in specie, by long usage, recognised and affirmed by the Courts of this country, is the legal description of dollars and sub-divisions of dollars, four of which dollars represent one pound currency; but there is no *express law* which declares or determines the relative value of one to the other, or how much in currency five sovereigns represent, nor how much in sterling six pounds currency, or six pounds in dollars, of four dollars to the pound, represent—while their relative *marketable* value is perpetually changing and fluctuating. If the law declared that a sovereign should be deemed and taken as an equivalent for twenty-four shillings currency, or that five pounds sterling should be deemed and taken as an equivalent for six pounds currency, there would be nothing in this case to argue, and judgment should be given for the defendant; the tender under such circumstances being clearly good in law. But although there is no express law declaring the relative value of sterling and currency, a usage has prevailed in our Courts for nearly thirty years, having, in its origin, the authority of the Crown to sustain it, whereby every verdict is changed from currency into sterling at one uniform rate, under which the plaintiff in this case would obtain a judgment, not for five sovereigns, or five pounds sterling, but for five pounds four shillings sterling. The extent of the admission in the case, as to the amount tendered being sufficient, does not mean sufficient in law, but can only mean sufficient, according to the relative *market* value of sterling to currency, or according to the rate of exchange at the period; and therefore the broad question for our consideration is, whether a tender for five sovereigns be a *legal* tender for a demand of six pounds currency, admitting that the former was, at the time, of the market value of the latter, or of its value according to the rate of exchange of the day? If the usage of the courts to which I have referred has had the effect of law in fixing the relative value of the one currency to the other, then, the admission only applying to the *market* value, the tender was clearly bad in law; and if the sum tendered was paid into court, the jury should find a verdict for the plaintiff for four shillings sterling. If, however, this usage does not fix the legal relative value of these two currencies, then that value is not fixed or ascertained by any law or usage whatever, and the next question is, whether under these circumstances that tender in this case can be sustained.

The common law allowed a tender *in certain cases* before action brought to enable a defendant to protect himself from costs; and also after action brought, he would be permitted to pay money into court in certain cases upon an undertaking to pay the costs up to the time of such payment; and in both cases, if the plaintiff did not recover more than the amount so tendered or paid into court, the defendant would be entitled to a verdict. It is important to consider the limits within which this privilege was allowed to defendants. "At common law a tender is allowed in all cases where a debt is due on specialty or simple contract, which is either certain or capable of being reduced to a certainty by mere computation, *without leaving any sort of discretion to be exercised by a jury.*"—*3 Steph. Pl. and Ev. 2599*; and in *Hallett v. East India Coy.*, *2 Burr. 1121*, Lord Mansfield observed, "In motions of this kind where the defendant applies to pay money into court, the law arises on the fact, and the true and sensible distinction is that where the sum demanded is a *sum certain*, or capable of being *ascertained by mere computation*, without leaving any other sort of discretion to be exercised by the jury, it is right and reasonable to permit the defendant to pay money into court"; and in *Searle v. Barrett*, *4 Nev. & M. 200*, and in a multitude of other cases, the converse of the rule is thus laid down, "A tender before action brought is not pleadable in an action for *unliquidated damages.*" There are several cases in the English reports of actions brought for the recovery of debts and demands in foreign money, but there is no instance of a tender in sterling being allowed in discharge of such debts and demands; while there are reported cases in which the courts refused to allow a sum in sterling to be paid into court as an equivalent for a demand in foreign money, on the ground that such a demand is one for unliquidated damages. When the law of England declares that sterling money shall be a legal tender for certain debts and demands, it means for debts and demands in sterling money, as all debts and all contracts in England are in sterling, unless it is expressly stated to be otherwise; but not for debts and demands in the currency of this or of any other country. The law of tender rests upon this just foundation, that the demand sought to be recovered in the action in which a tender can be pleaded and relied upon is one ascertainable by mere computation, and the value of the money in which the tender is made being fixed by the law of the land, each party, if honestly disposed, may easily know, the one what he has a right to de-

mand, and the other what he is bound to pay *by mere computation*; but the law of tender never extended to a case in which the amount of the plaintiff's claim was uncertain, and the amount of which could only be ascertained by a jury; nor did the law ever permit a defendant in discharge of such an action, save in a few cases expressly provided for by statute, to tender, not the amount of the demand, but a sum by way of *amends* in liquidation of the claims, and thus place a plaintiff seeking just redress in peril of paying the costs of the action in a case in which no tribunal but the jury could ascertain the precise amount of his claim against the defendant. In *2 Steph. Com. 495*, it is said, "The coining of money is in all states the act of the sovereign power—that its value may be known on inspection; and as the value of money not authenticated by this means cannot *be easily ascertained*, it is consequently the rule of the common law that no tender of payment of any debt is valid and sufficient unless made in the common coin of the realm." This being the law, a tender of six pounds of our currency for five pounds sterling would be a bad tender, and upon precisely the same principle, viz: that the relative value of the currency of other countries to that of England not being fixed or ascertained by law, you cannot tender a sum in sterling in discharge of a demand in the currency of this or of any other country.

In this case the defendant is sued for six pounds currency: he pleads a tender of five pounds sterling; he admits that he owes six pounds currency; but he submits to the court that five sovereigns is in *law* a discharge of that debt. It is an answer to that plea that we know no law which sustains the position of the defendant, for there is no law which determines the relative value of sterling and currency, and as that is a fact that must be left to the *discretion* of a jury, exercised upon evidence to be submitted to them, and can only be ascertained by them, the case is at once shewn not to be within the rule which allows the plea of tender in certain cases.

In *Rands v. Peck, Cno. Jac. 618*, the action was for 600 guilders of legal money Polish. The court held that the value of these guilders was "to be found by the jury," that the demand of 600 guilders was not a "demand of any sum certain and the value thereof is not known to the court," and the court added "that the sum was uncertain and not known to the court and the *certainty* that he shall recover shall be made by the jury." In *Bagshaw v. Plair, Cro. Eliz.*, it was held that "In debt on bond for such a sum Flemish, it must be found by a

writ inquiring what the value is in English." All the justices and barons held it (the judgment) to be error—for the value of Flemish money is not known to us, no more than the value of twenty quarters of wheat or the like, whereof the value is to be enquired." Again *Draper v. Rastal*, Cro. Jac. 88, shews that mere computation cannot ascertain the amount. In that case, "the defendant having suffered judgment by default in an action of assumpsit in London, on a judgment of one of the courts in Paris, the court would not refer it to the master to see what was due and give the plaintiff liberty to enter up final judgment for such sum without executing a writ of enquiry,"—that is, without submitting the question to a jury. In *Maunsell v. Lord Masserene*, 5 F. R. 88, "the defendant suffered judgment by default in an action on a bill of exchange for £200 Irish money, and the court refused to refer it to the master to inquire what was due for principal interest and costs, upon the ground that this was foreign money, *the value of which could only be ascertained by a jury*"; and the same principal was acted upon in *Messer v. Lord Masserene*, 4 T. R. 87, in an action on a judgment obtained in one of the courts in Paris. In *Cuming v. Munro*, 5 T. R. 87, the plaintiff declared on a bond for £2400 proclamation money of North Carolina, and the defendant applied to pay money into court, but the court refused the motion saying, "the jury are the proper judges of the value of this money."

These cases clearly establish that a demand for so much in foreign money is a demand for unliquidated damages, the amount of which cannot be ascertained by mere computation, but only by the verdict of a jury on evidence submitted to them, and it is not therefore a demand of that character respecting which the law permits a defendant to rely upon a tender in sterling in discharge of an action brought for its recovery. The principle upon which these cases were decided cannot be distinguished from the present case, for it simply amounts to this, that the relative value of foreign money to British sterling money not being fixed by law, when a demand in foreign money is sought to be recovered in England, it is a demand for unliquidated damages; and for precisely the same reason in this country the relative value of currency to sterling not being fixed by law, a demand in currency is a demand for unliquidated damages, so far as respects a tender or offer of payment in sterling, and no tender in sterling money can therefore be relied upon.

The following passage from *McCulloch's Dictionary of Commerce*, 322, will illustrate the question we are now considering: "If both gold and silver coins be made legal tenders, it is obviously indispensable that their value with respect to each other should be fixed by the authority; or that it should be declared that individuals shall be entitled to discharge the payments upon them by payments either of gold or silver coins according to some regulated proportion. The practice of making both metals legal tenders was long adopted in England. From 1257 to 1664 the value of gold coins was regulated by proclamation, or which is the same thing, it was ordered that the gold coins then current should be taken as equivalent to certain specified sums of silver. From 1664 down to 1717 the relation of gold to silver was not fixed by authority, and silver being then the only legal tender the value of gold coins fluctuated according to the fluctuations in the relative worth of the metals in the market, but in 1717 the ancient practice was again reverted to and it was fixed that the guinea should be taken as the equivalent of twenty-one shillings and conversely."

Upon these grounds we are clearly of opinion that the tender of a sum in sterling for a demand in currency is not a good legal tender, because the value of the one in respect to the other is not fixed by law, and in each particular case can only be ascertained by a jury. A consideration of what has occurred on former occasions in this and the neighboring colonies on this subject, one would imagine, ought to satisfy the most sceptical that this tender could not be maintained. It 1825 it was deemed desirable to make sterling money a *legal* tender for demands in currency, and how was it effected? By an order in Council by his Majesty King George 4th, "that a tender and payment of British silver and copper money to the amount of four shillings and fourpence should be considered as equivalent to the tender or payment of one Spanish dollar, and so in proportion for any greater or less amount of debt." In pursuance of that order, Sir Thomas Cochrane, the then governor of the colony, by proclamation amongst other things declared, "that as the Spanish dollar is current as equivalent to five shillings of money of account, therefore that seventeen shillings and fourpence of British silver and copper money is hereafter to be deemed and taken as being equal in value to one pound of money of account in this island and its dependencies." What rendered these documents necessary but the fact that to make British sterling a legal tender for demands in currency, the re-

lative value of the one to the other should be fixed and ascertained by lawful authority? In 1838 by another proclamation the value of the dollar was altered from four shillings and fourpence to four shillings and twopence.

In Canada the same state of things existed as do now exist in this country; and it was, I presume, found that the law of tender afforded no remedy for the inconvenience, and therefore the Legislature enacted several laws regulating the currency of that country, in the most recent of which, the 16th Vic. c. 158, s. 4, the following provision is contained: "That the pound sterling shall be held to be equal to one pound four shillings and fourpence, or four dollars and eighty-six cents and two-thirds of a cent currency, and any British sovereign of lawful weight shall pass current and *be a legal tender for that sum.*" Similar enactments have been passed by the Legislatures of New Brunswick, Nova Scotia and Prince Edwards Island: a course of legislation which clearly indicates the opinion of these countries, that under the law of tender parties could not tender sterling money in discharge of demands in currency, until their value in respect to one another was fixed and determined by lawful authority.

Upon all these grounds we are of opinion that the tender in this case was not a good legal tender, and that the plaintiff is therefore entitled to judgment.

Mr. Robinson, Q.C., for plaintiff.

Hon. P. F. Little, Attorney General, for defendant.

IN RE FISHERY SERVANTS OF PATRICK CASHMAN, 11
INSOLVENT DEBTOR.*

1854. BY THE COURT.

Receiver of voyage—Fishery servants—Wages—Insolvency of employer—Usages of fishery—Right of servants on insolvency of employer to follow produce of voyage into the hands of the receiver.

There is no usage or custom of the fishery prevailing in Newfoundland whereby fishery servants have the right to follow the produce of the voyage in the hands of the merchant who received it, so as to compel him to pay them their wages on the insolvency of their employer.

No such custom could exist, wanting as it does the grand essential of custom, viz.: prescription—antiquity beyond the memory of man.—(Chief Justice Norton in *Moreen v. Ridley*).

Such a right did exist under 15 Geo. III., cap. 31, sec. 16, but that Act was repealed by 13 and 14 Vic., cap. 80.

UPON hearing the affidavits of Patrick Leary, Michael Hogan, and John Murray, and on hearing Mr. Robinson, Q. C., of counsel for the said parties, it is ordered that Edward Bowring and Henry P. Bowring, trading under the firm of Bowring Brothers, do pay to the said Patrick Leary, £13 currency, to said Richard Hogan, £7 9s. cy., and to John Murray, £8 cy., being the balance of wages, and wages due to the said parties as servants in the fishery, during the past summer, of Patrick Cashman, insolvent, the said Bowring Brothers having received the wages of said Patrick Cashman, with costs, unless cause to the contrary be shown in four days.

By the Court, 21st Nov., 1853.

CHARLES SIMMS,
Chief Clerk and Registrar.

On motion of Mr. Robinson, Q. C.

The Acting Solicitor-General showed cause against the above rule as follows:—The learned gentleman after having taken several objections to the mode of proceeding and particularly objecting to the proceedings by rule, which deprived the defendants of their right to a jury and precluded their giving any evidence to contradict the plaintiff's case, other than by volun-

* *Vide* Dooley v. Burke and Hackett, Supreme Court Select Cases, 1819.
" Rourke v. Baine, Johnson & Co., Supreme Court Select Cases, 1820.
" In re Barron's Servants, Supreme Court, 1850.
" Insolvent Estate Ridley & Sons, Newfoundland Law Reports, Vol. 3, 1870.
" Antle v. Baine, Johnson & Co., Newfoundland Law Reports, Vol. 1, 1885.
" Parsons v. Fox, Trustee, Supreme Court, March 10th, 1898.
" Insolvency, cap. 83, sec. 24, Con. Statutes, 2nd series.—[EDITOR].

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teering affidavits; on the main ground argued that there was no custom on which this application could rest, and the only enactment that had any bearing on the matter was the 25th section of the Judicature Act, 5 Geo. 4, cap. 67, which in its terms, as far as the right of servants is concerned, is merely negative, which cannot have an affirmative effect. At the time of the passing of the Judicature Act the statutes 15 Geo. 3, cap. 3, and 5 Geo. 4, cap. 51, were in existence, but having since been repealed, there was nothing on which the proviso in the 25th section of the Judicature Act could operate. With reference to the terms "value or produce thereof," they meant merely this, that the property passing into the hands of the assignees, immediately upon a declaration of insolvency, was by them sold, which is the produce or value thereof; it could not be pretended that it meant fish and oil in the hands of the merchant, for then it would be subject to this consequence, that it would repeat or double the remedy of fishermen just as many times as the property changed hands. If then there is no statute law which provides for the claim sought to be set up, the only thing that could sustain it would be a valid legal custom; does such a custom exist? He, the learned gentleman, had never heard of such a custom, except in the Legislature; never in a court of law. Such a custom could not exist as a mercantile usage which is based upon a contract, and, therefore, cannot affect third parties. The contracts of fishermen are made between them and the planter, and if the fisherman refused to work or perform his contract, it could not be contended that the merchants could sue him, who only acts between them (the fisherman and plaintiff) as an agent, or that the servant could sue the merchant for his wages. Further, if there be a custom, that custom must be shown to exist in two ways—either by evidence or judicial decision. In this case there was no evidence offered to show the existence of the custom, nor could there, so as to show it a good custom; it must have been in force from time immemorial, which could not exist in this country as it was only discovered in the reign of Henry VII. This principle is clearly laid down by Blackstone, Stevens and Coke. To constitute a good custom it must likewise be a reasonable custom and continuous, that is, the right must never have ceased, although it may not have been in practice. In this case a custom such as that statute could not have existed prior to it or there would have been no necessity for the

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statute; if, on the other hand, the statute established a different rule from any before existing, it thereby broke the previous custom and put an end to it. As to the reasonableness of this custom, however well the statutable provisions were applicable to the condition of this country at the time of the passing of the several statutes referred to, those circumstances had materially altered since. Then all the fish and oil was sure to find its way into the hands of the merchant direct from the planter, but now in every harbor of the country the trader is to be found bartering and taking produce, which, although ultimately it may find its way into the hands of the merchant, did so as the property of others, and not as the property of the planter, catcher or curer thereof. With reference to any judicial decision upon the matter, the learned counsel stated that he had looked into the cases reported in the "Select Cases," and upon examination of them he found that the several decisions rested not upon any recognised custom, but upon the provisions of the statutes referred to here. The learned gentleman referred to and commented very fully upon the following cases reported in the select cases: *Rourke v. Baine, Johnston & Co., p. 237*; *Trustees of Crawford & Co., and Cunningham, Bell & Co., p. 43*; *Trustees of Benning & Houlahan v. Brown, Hoyles & Co., p. 225*; *Luke Doyle's servants and the receivers of the voyage, p. 292*. The learned gentleman closed by saying that for all these reasons, he submitted that the rule should be discharged with costs.

Mr. Robinson, Q.C., in supporting the rule was stopped by the court, and desired to confine his argument to the main ground and pass over the objections to the proceedings as if they were admitted by the court. Mr. Robinson then said, my position is this that before the passing of the statute 15th Geo. 3 there was a valid custom giving to the fisherman of this country a preferable claim on the fish and oil for his wages, of which custom the statute of 15 Geo. 3 was only declaratory. That the custom existed concurrently with the statute, and that consequently after the repeal of the statute which was couched in affirmative and not in negative terms, the custom still existed. My duty will be, said the learned gentleman, to prove that such a custom did exist before the statute and still exists. That the 49 Geo. 3, sec. 7, commonly called the Fishery Act, is still in existence, and that the 10th section of 5 Geo. 4, cap. 51, has been perpetuated by the opera-

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tion of the proviso in the Judicature Act, 5 Geo. 4, cap. 67. That the 13th and 14th Vic. which repealed the 15th Geo. 3, repealed nothing more than the identical section of that act; it is worded thus after reciting the 10th section of the statute, enacts that the said "enactment" be repealed, but does not touch any custom that may have existed before and concurrently with the statute, nor the law under any other statute. I have said, said the learned gentleman, that the 7th section 49 Geo. 3, is still in existence; it was held to be law in the case of Doody's servants against Barron, Jan. 1850, in which case it was also decided by the Chief Justice that the payment of wages was not confined to cases of insolvency, but the lien extended to all cases; likewise in the matter of the distribution of the estate of Sullivan, Chief Justice Norton and Judges DesBarres and Lilly held that the proviso in the 27th section of the Judicature Act gave vitality and perpetuity to the prior rights of fishermen under the 10th section of the 5th Geo. 4, cap. 51, notwithstanding that the last-named statute itself had expired. It had been argued by Mr. Hoyles that third parties, such as merchants, could not be affected either by the custom or the statute, but it was evident and had always been held that there was an identity between merchant and planter in this country which constituted them, as regards servants' wages, one. The proceeds of the voyage in the hands of the merchant, for the purposes of the servants engaged in catching and curing it, can only be looked upon as the property of the planter, for otherwise the provision of the statute would be useless, as the fish and oil, whilst on the flake, was subject to the lien of the servants for their wages, and if it went into the possession of the merchant before payment, which was almost invariably the case, the lien ought and has been held to attach. Further, it is said that the words of the proviso in the Judicature Act are not affirmative, but are only declaratory. Looking at the construction of the sentence, such would not appear to be the case, as the word "the" before "prior claims upon the produce or value thereof" makes it definite and operates as a recognition of the prior claims of the fishermen; neither do the words "produce or value" bear the construction assigned to them by Mr. Hoyles, nor does the consequence of which he speaks, follow, for, as in the instance of a bill of exchange, many parties are liable, but liable only for one and the same amount, and where that amount is paid by any of the parties to the bill, the others

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are discharged from any liability thereon. These words therefore clearly meant to make the produce and value of the fish and oil liable to the payment of wages, and this is the more certain from their being imported into the statute in consequence of the custom, by which they were used and recognized. Again, it is said that the statute 15 Geo. 3, destroys the custom; whereas the law expressly lays down that a custom and a statute which embodies that custom, can exist co-temporaneously, and that any party may have his remedy either under the statute or the custom.—*Dwars*, 474, 476. But then, this custom is not reasonable, says Mr. Hoyles. What is more reasonable, than that the laborer should be paid, and that too out of the proceeds of his labor? Has not the tailor, and in fact every tradesman, his lien upon the article he manufactures, and why not the fisherman? There is no reason against it, but everything in its favor. This then shortly is my case, said the learned gentleman, and your lordships will perceive it to be two-fold, first that the fisherman has this right, by virtue of the statute law, and likewise by virtue of a custom. I have tried to show the first, I shall now proceed to lay before you the evidence in support of the other. The learned gentleman had referred to a decree of Governor Lloyd, made in the year 1754, and reported in a report from a committee of the House of Commons on the trade of Newfoundland, made in the year 1793 and published in the "Report from Committees of the House of Commons," vol. 1, p. 457. Also, Mr. Graham's evidence, Secretary of the colony, in the same report, p. 461-2; and also Chief Justice Reeves' evidence, p. 475. The following judicial decisions, reported in the select cases, were also relied upon by the learned gentleman in support of the custom: *Trustees of Crawford & Co. vs. Cunningham, Bell and Co., select cases*, p. 43; *Meany vs. Pynn*, p. 58; *Baine, Johnston & Co. v. Alexander Chambers*, p. 173; *Patrick Dooley v. Patrick Hachett*, p. 216; *Beehant & Sheppard v. Trustee of LeMessurier's Estate*, p. 414. Another objection urged by Mr. Hoyles is that this is not a good custom, as the rule "time immemorial" cannot be applied to it; but this does not hold, as this custom is more in the nature of a usage than custom, and is so regarded in all the cases which make use of the word custom and the word usage when speaking of this matter as if they were, which in reality they are, synonymous. For all these reasons the learned gentleman submitted that the rule should be made absolute with cost. Court took time to consider.

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IN this case Mr. Robinson obtained a rule *nisi* in the Supreme Court "That Edward Bowring, C. F. Bowring and H. P. Bowring, trading under the firm of Bowring Brothers, do pay to P. Leary, £13, to Richard Hogan, £7 9s., and to John Murray, £8; being the balance of wages and wages due to the said parties as servants, in the fishery during the past summer, of Patrick Cashman, insolvent, the said Bowring Brothers having received the voyage of the said Cashman." Against this rule Mr. Hoyles showed cause last term. The facts relied upon by the petitioners were not controverted. Several formal objections were taken to this proceeding, but the great question argued in the case was the right of servants in the fishery to follow the produce of the voyage in the hands of the merchant who received it, so as to compel him to pay them their wages. That is the question in this case, for although the planter, Cashman, was declared insolvent in the Central Circuit Court, subsequent to his handing over the proceeds of the voyage to the Messrs. Bowring, the present application is not an application in that matter, or for a distribution of the insolvent's estate, or for a declaration of the rights of servants at the fishery as against the estate of an insolvent planter; if it were it should have been made in the Central Circuit Court, and not in this Court; it should have been against the trustees or trustee of that estate, and not against third parties who are not shewn to be connected with the insolvency matter at all, and it should have sought to affect the estate and effects of the insolvent and not property, viz.: the produce of the voyage, which is not shewn to have formed any portion of the assets of the insolvent, Cashman, when he was declared insolvent. A short time ago this Court decided that servants at the fishery had, under the 16th section of the Imperial Act, 15 Geo. 3, cap. 31, a right to follow the proceeds of the voyage into the receiver's hands in order to have their wages paid thereout, and that right existed whether the planter was or was not insolvent. Since that decision was pronounced that "enactment" has been repealed by the Imperial Act, 13, 14 Vic., cap. 80; but in this case Mr. Robinson contended that this right still existed under other statutable provisions to which he referred; or, if not under these, then that it existed under an ancient custom of the fishery which gave this right, and which, he argued, was now in force. The 49 Geo. 3, cap. 27, sec. 7, was the first enactment referred to, but it merely provides "That in the dis-

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tribution to be made of the estate and effects of a person declared insolvent every fisherman and seaman, who shall be a creditor for wages become due in the then current season, shall be first paid twenty shillings in the pound, so far as the effects will go." From the distinction we have drawn between the present application and one made in the insolvency matter, and for distribution of the goods and effects of the insolvent at the time of his insolvency, it is manifest that statute cannot at all affect the present case. The 5 Geo. 4, cap. 51, sec. 10, gave the fishing servants precisely the same rights upon "fish and oil" which they had under the Act of Geo. III., and extended the same right to persons who supplied bait; but that statute was a temporary act, to continue for five years, and expired in 1829. Mr. Robinson contended that the provision in the 10th section of this statute was perpetuated by a subsequent Act, 5 Geo. 4, cap. 67, although the former statute was only temporary. For this purpose he relied upon the 25th section of the latter statute, which enacts "That in the distribution to be made of the produce of the estate and effects of every person or persons hereafter declared insolvent in Newfoundland and its dependencies as aforesaid, every creditor for supplies necessary and furnished *bona fide* for the fishery during the current season shall be considered as a privileged creditor, and shall first be paid twenty shillings in the pound, so far as the estates and effects of such insolvent person or persons, which may be realized in Newfoundland or its dependencies, will go, and that all other creditors shall be paid equally and rateably. Provided always, that nothing in this Act contained shall affect the prior claims of seamen and other servants actually employed in the catching and taking of fish and oil upon all fish and oil caught by the hirers or employers of such seamen, fishermen or servants, or the produce or value thereof." This enactment, like the 49 Geo. 3, cap. 27, before noticed, has reference to the distribution of the estate, goods and effects of insolvent debtors, and is subject to the observations already made upon that statute and to the distinction we have drawn between a question as to the privileged or preferable claims of the fishing servants in such a distribution and the rights contended for in this case. The enactment, after declaring that the supplying merchant shall be a privileged creditor, provides that that preference or privilege is not to affect the prior rights of the fisherman in such distribution, and we are not aware

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that it has been ever decided that that enactment did affect such rights, nor can any decision we make in this case affect them, because we are not, as we have already said, considering the rights of the fishermen or of any other parties in the distribution of an insolvent's estate. Whatever their rights are in such distribution will be decided when the case comes properly before the Court if any doubt exist about them; but we are not aware that any such doubt does exist as to their priority against other creditors in the distribution of the assets of an insolvent. It was, however, also contended that the words giving preferable rights to the fishermen in the former enactment, expressing these rights to be upon "the fish and oil," and the proviso in the 25th section of the 5 Geo. 4, cap. 67, in addition to these words, having the words "or the produce and value thereof," gave a larger privilege to the fisherman than they had under the previous enactments, and should, therefore, be regarded as a substantive subsisting enactment, giving a right to follow the produce of the voyage for payment of their wages, notwithstanding the repeal of the 15 Geo. 3, cap. 31, and although the temporary Act, the 5th Geo. 4, cap. 51, had expired. This argument was based upon an unfounded supposition, because the words "fish and oil" in the earlier statutes gave to the servants as extensive rights to "the produce and value thereof," (that is, of the fish and oil), as the introduction of these words could have done; and such was the construction put upon the language in the earliest statutes by the courts from the passing of the 15 Geo. 3, down to the decision of the case of *In re Barron's Servants*, in which this Court so construed these words "fish and oil," and ordered payment out of the produce and value thereof in the hands of the receiver of the voyage. Upon these grounds we are of opinion that the provision in question had no operation save to protect the prior rights of servants in the distribution of insolvent estates from being prejudiced by the enactment in favor of the supplying merchant upon which this proviso was engrafted; and these being the only statutable enactments relied upon to show that the fishing servants of a planter who has delivered the proceeds of the voyage to his supplying merchant can follow it in the hands of such merchant when the planter has subsequently become insolvent, we are clearly of opinion that they confer no such right, and that upon this ground the cause of the petitioners cannot be sustained. It was next argued, on

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the supposition that this claim could not be supported upon any legislative enactment now in operation, that it could be sustained under a custom, whereby the right of the fisherman to follow the oil and fish in the hands of the receiver of the voyage was established prior to the 15 Geo. 3, cap. 31, sec. 16, and which custom, it was contended, would revive by the repeal of that enactment. There are ancient customs recognized by the laws of England which have all the force and effect of statutable enactments. Such customs are laws not written, but established by immemorial usage. The first essential requisite to make such a custom valid is "That it have been used so long that the memory of man runneth not to the contrary. So that if any one can show the beginning of it within legal memory, that is, within any time since the first year of Richard I., it is no good custom." Therefore, no custom which had its origin subsequent to the discovery and settlement of these colonies can be relied on as a valid custom, having the operation of unwritten law. In accordance with this view Chief Justice Norton, in *Moreen v. Ridley*, said, in reference to a claim similar to the present, "neither can this claim be rested on the foundation of custom; no such custom exists, wanting, as it does, the grand essential of custom, viz., prescription—antiquity beyond the memory of man." There is, however, no doubt that for many years before the passing of the 15 Geo. 3, cap. 31, what has been frequently called custom, but with more propriety would be termed a usage of the fishery, prevailed, whereby the fishing servants were held entitled in some instances to detain the oil and fish until their wages were paid or secured, and, in other instances, to follow the proceeds of the voyage in the hands of the party who received it in order to obtain payment of their wages. Such a usage might be justified and upheld upon the principle that where a general usage, practice and understanding exist in relation to any particular branch of trade, or in the practice of any trade or commercial pursuit, it would be competent for the judicial tribunal to presume that parties making contracts in such trade or pursuit meant to contract and deal according to that general usage, in the absence of any express stipulations to the contrary. This is the only *legal* ground upon which the rights of the fishery servants to follow the produce of the voyage in the receiver's hands for their wages could be maintained prior to the 15 Geo. 3. But, in truth, the history of

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that period, so far from shewing such a general understanding and assent to such a usage in the fishery on the part of all those concerned in it, namely, the merchants, planters and fishermen, proves that the enforcement of that usage rests more upon what power and authority deemed expedient than upon any well settled legal rules or principles, and the resistance made to its enforcements led to the passing of the Geo. 3, cap. 31. That statute has, since its enactment, regulated the rights of the parties in this respect, and therefore precludes the existence of any mere usage of trade as determining the rights of the fishermen for the last seventy-eight years; and the history of this question since the expiration of the 5th Geo. 4, cap. 51, proves that so far from merchant, planter and fishermen concurring in or assenting to the existence of any such usage in the trade, the right has been denied and the claim questioned and resisted, at least by one of these classes, in every possible way. Upon all these grounds we are of opinion that the claim of the petitioners in this case cannot be sustained on either of the grounds upon which it was advanced, and that the petition must, therefore, be dismissed, but without costs.

Mr. Robinson, Q. C., for servants.

Mr. Hoyles, Q. C., for receiver of voyage.

WILLIAMS ET AL, ASSIGNEES OF RUTHERFORD, 21
v. PETER ROGERSON ET AL.

1854, January. HON. SIR F. BRADY, C. J.

Insolvency—English Bankruptcy Law—Application to Newfoundland—Bankrupt residing in Newfoundland declared bankrupt in England—Payment in full by bankrupt's agent to creditor in Newfoundland after declaration in England but before notice, effect of—Vesting of bankrupt's assets.

A bankrupt's place of residence was in Newfoundland, and his only place of business was there also, but, being in England, proceedings were taken there against him by creditors, and he was adjudged bankrupt and his assets vested in the hands of assignees. Subsequent to the vesting order the bankrupt's agent conducting his business in Newfoundland paid certain parties there in full for goods previously sold to the bankrupt.

In an action by the bankrupt's assignees against the parties so paid to recover back the several sums, it was contended that the English Bankruptcy Laws did not extend to the colonies.

Held—The English Bankruptcy Laws do not extend to the colonies as a code regulating bankruptcies in the colonies, but their effect is to vest in the assignee the debtor's personal property which may be there.

THIS was an action of assumpsit brought by the plaintiffs as the assignees of Robert Rutherford, who had been declared a bankrupt in England, to recover a sum of money from the defendants which they had received, as creditors of the bankrupt, from his agent in this country, after the declaration of bankruptcy in England. The bankrupt's place of residence was in this country, and his only place of business was here also; but being in England in the early part of the year 1853, proceedings were taken against him by creditors of his in England in the Court of Bankruptcy for the Manchester district, and he was, on the 19th April, 1853, adjudged a bankrupt by that court; and upon the same day the plaintiff, J. S. Pott, was appointed official assignee "to be an assignee together with the assignee or assignees to be chosen by the creditors of the said bankrupt." Upon the 3rd May following, John Williams, the other plaintiff, was chosen assignee by the creditors, and that choice was duly confirmed by the court. On the 25th April the agent of the bankrupt conducting his business in this country, paid the defendants £16 19s. 9d. for goods previously sold and delivered to the bankrupt. The present action was brought to recover that sum as part of the assets of the bankrupt, and at the trial I directed a verdict for the plaintiff, saving liberty to the defendant to have that verdict turned into one for the defen-

dant, if it should appear that the action was not maintainable in point of law. An objection was taken that as one of the plaintiffs was appointed after the payment had been made, he ought not to have been joined as co-plaintiff with the official assignee, but I did not consider that there was any foundation for that objection, and I am now of opinion that he was properly named as one of the plaintiffs. The question upon which I entertained a doubt was whether a fair and honest mercantile transaction in this country, like, as in this case, the payment of a *bona fide* debt to a creditor by the authorised agent of the debtor, could be over-reached by a declaration of bankruptcy in England against the debtor, of which the parties here had no notice whatever until some time after that transaction had been completed, although the declaration of bankruptcy had been made in England some time before? The plaintiffs rely upon the 141st section of the Imperial Statute, 12, 13 Vic., cap. 106, "The Bankrupt Law Consolidation Act." It enacts "that when any person shall have been adjudged a bankrupt, all his personal estate and effects present and future, *wheresoever the same may be found or known*, and all property which may revert, descend, be devised or bequeathed, or come to him, before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right, and interest in such debts, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment, and after such appointment, neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of London or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt." The language of this section is too plain to admit of a doubt that, under it, all the personal property of the bankrupt, wherever this statute has operation, is divested from him and vested in his assignees upon their appointment, and consequently, if operation and effect is to be given to it in this country, the property of the bankrupt, in the possession of his agent here vested in the official assignee on the 19th April, and the money which the defendant received on the 25th of that month was not the money of the bankrupt, but of his.

assignees, and they would be entitled to recover it, as his or their property, from the defendant. Mr. Robinson, however, contended that the English bankrupt laws do not extend to the colonies and cited some cases in support of that position. The meaning and extent of that proposition, however, is that the English bankrupt laws do not extend to the colonies, as a code of law regulating bankruptcies in the colonies; but it does not follow that they do not operate upon the property of the bankrupt which may be in the colonies when the declaration in bankruptcy is made in England. On the contrary, it is well settled that they do so operate, and the law is thus correctly stated in *3 Burge's Colonial Law*, 915. "The English bankrupt laws do not extend to the colonies but their effect is to vest in the assignees the debtor's personal property which may be there." There are several authorities which establish that these laws operate upon the debtor's property in Ireland and in Scotland, although they do not extend to these countries any more than they do to the colonies. In *Neale vs. Cottingham*, 4 T. R. 189, a decision was pronounced by the Court of Chancery in Ireland which applies forcibly to the question in this case. Grattan, a merchant in London, failed, and a commission of bankruptcy in England was issued against him on the 28th October, 1763. On the 10th November his effects were assigned. A debt being due in Dublin to Grattan, a creditor of his made affidavit, and commenced an action in Dublin, and on the 31st October, three days after the commission in England, attached the debt. The creditor, having obtained judgment, received £600—of the debt, and afterwards a bill was filed in the Court of Chancery by the English assignees against this creditor, to have an account taken of what this creditor had received, and a decree for payment to them. Lord Lifford was Chancellor, and the question being important, and the first of the kind in Ireland, he called in the assistance of several of the judges, and they concurred in the decree pronounced by him in favour of the assignees, and ordered the creditor to pay them the money which he had received. Again, in *ex parte Debree*, 8 Ves. 82, it was ruled that "when property attached in another country becomes by the laws of that country vested in the creditors attaching, upon confirmation by its court, the creditors attaching are entitled to hold the property attached, where the act of bankruptcy was *previous*, they could not hold against the assignees. This authority establishes this proposition that

if the defendant in this action had proceeded by attachment to recover his debt and had obtained a judgment of this court under which he compelled payment of the debt on the 25th April, instead of the voluntary payment on that day, that judgment would not enable him to retain the money so paid against the assignees, if the judgment were had on any day after the 19th of April, the day on which the debtor was declared a bankrupt in England." I shall only refer to another authority to the same effect, but establishing also that the assignment in bankruptcy in England vests the personal property of the bankrupt in other countries in the assignees without or before notice of the bankruptcy in these countries. I refer to the case of *Selkrig vs. Davies, 2 Rose, 97*, in which it was held that "the assignment under an English commission vests in the assignees, and without the necessity of notice, the whole of the bankrupt's personal property in Scotland; and all subsequent diligence by any Scotch or other creditor is thereby precluded." The principles recognised and acted upon in these cases leave the right of the plaintiffs to recover in this action free from doubt, and therefore the verdict had for them must stand, and the rule be discharged. Instances of apparent injustice, which might result from the law as I have stated it, were strongly relied on in the argument of this case, but, although such should be the consequence, that circumstance could not affect the decision of the court when the law is clear and plain; and moreover, when it is considered that what the law declares in this, that, from the moment a party is adjudged a bankrupt, all his property, wheresoever it is, shall vest in his assignees, for a fair and just distribution thereof amongst *all* the creditors of the bankrupt, and that after that event no individual creditor should be permitted to take advantage of a transaction, like the payment in this case, whereby he would receive out of the assets of the bankrupt his *entire* debt, to the prejudice of the rest of the creditors, it may be regarded as the most just and equitable rule that could be established to protect the rights of all the creditors of a bankrupt.

1854, *January*. HON. SIR F. BRADY, C J.

Landlord and tenant—Parol agreement for a term of twenty-one years—Termination of agreement by tenant at the end of the first year—Verbal notice, sufficiency of—Waiver of parol notice by insufficient written notice.

Under an agreement not reduced into writing for the letting of a farm for twenty-one years, at a rental of £25 per annum, a dispute arose between the parties and the tenant determined on surrendering the farm, and did surrender the same on the termination of the first year, having previous to the said termination given verbal notice to his landlord of his intention so to surrender. In an action for rent for the third half year,—

Held—Parol notice was sufficient under the circumstances to justify the surrender of the premises.

MR. ROBINSON in shewing cause on rule *nisi* to set aside non-suit, argued that the non-suit was rightly directed by the court, as from the evidence upon the trial it appeared that the tenancy was one from year to year, that notice to quit on the part of the defendant had been given to the plaintiff, and that there was no evidence to prove that such tenancy was not terminated by the notice, as there was an absence of all evidence to prove the occupancy of the defendant after the notice.

Mr. Hoyles, on the part of the plaintiff, said that this was an action for the recovery of a half-year's rent ending on the thirty-first day of October last; the evidence was that the defendant was in possession up to that period, and that therefore the tenancy was not put an end to. To sustain this view the learned gentleman argued that it was a principle of law "that everything remained in the same state as when last seen except the contrary be shown." The evidence in this case was that Fitzgerald, the servant of defendant, was in possession the year before as such servant, and although he gave notice that he would leave, it was also shown that after such notice that he retained possession of the premises, and no evidence was offered to prove that he had discontinued the possession or ceased to be the servant of defendant, and that, therefore, he must be looked upon as the servant of defendant and as still holding possession for him. But suppose that notice was given and that defendant had ceased to occupy after such notice, the next question that arises is, was the notice a good one? Under the authority of *Doe Dem Rigge v. Bell*, 5 term, rep. 471, although the agreement under which defendant entered may be considered void under the statute of frauds, and the tenancy thereby created to be a mere tenancy from year to year, yet such agreement regulates the tenancy in

other respects. Under the agreement then the rent was payable on the first day of May and the first day of November; two notices were alleged to have been given—one a written, and the other a verbal notice. The first was given after the first day of November, between that date and the fifth, which could not bind the plaintiff as the first day of May would arrive before the expiration of six months from the date of such notice; it took place in a conversation between the parties several months before, and was not intended or considered by the parties as a notice to quit. But supposing either of these notices to be good, the question was one for a jury and not for the court, under the authority of the case of *Jones and Shares, 4 Adl. and E. 832*. For all these reasons, the learned gentleman submitted that the non-suit should be set aside and a new trial had.

BRADY, C. J.:

This was an action for use and occupation of a farm. It appeared in evidence given on behalf of the plaintiff that upon the 5th May, 1852, he agreed to let the land to the defendant for a term of twenty-one years from the 1st May, 1852, at the rent of £25 a year; that the defendant took possession of the farm, placed Fitzpatrick (a servant) in possession of the house upon it, and paid the rent thereof for one year, and this action was brought to recover the third half-year's rent. The plaintiff by the terms of the agreement, which was not reduced to writing, was to have the use of a horse for a year or more, as he pleased; to have the implements of husbandry absolutely, and "the manure on the farm." Soon after the defendant took possession a dispute arose about the manure, and it appeared that there was some manure in the yard on the farm and a large heap outside the fence of the farm, the old Torbay road separating the manure from the farm. The plaintiff had been in the habit of making his manure for this farm in the same place for several years previously. The defendant proceeded to take this manure as part of what was given to him as "manure on the farm," when he was prevented by the plaintiff, who insisted that he only intended to give the manure in the yard upon the farm. The defendant then complained that he could not work his farm without the manure, and it being still refused to him, he said, "he would not keep the place," and again he said "he would keep the place for that year and that he would then give it up." It also appeared that some time before the 6th November, 1852, the defendant gave a notice

in writing that he would give up the farm on the 6th May, 1853. On the 6th May defendant offered to deliver up the house, which was refused by the plaintiff, and a week before this the defendant's servant, who lived on the farm, requested that the plaintiff would go out and take possession of the place, which the plaintiff's son (the witness) refused to do. It appeared also that Fitzpatrick had since May, 1853, remained in the house on the farm, but that "the farm was idle all the summer." This was the case proved by the plaintiff, and the court being of opinion that the defendant had given a sufficient notice to quit at the end of the first year of the tenancy, and was not therefore liable for rent of the third half-year, nonsuited the plaintiff.

On motion to set this non-suit aside, it was contended that the first notice which, it was admitted, was given in time was insufficient, and also, that if sufficient, it was waived by the notice in writing, and that the latter was not given in time, as it was served after the 1st November, and the tenancy was to commence from the 1st May. The objection to the written notice cannot be questioned, but we are of opinion that the parol notice was sufficient, that the evidence was all one way as to its being acted upon, and that it was the fault of the plaintiff himself that he had not possession on the 1st May, and that Fitzpatrick remained there afterwards, because plaintiff's son proved that a week before the 6th May he was asked to take possession, and on that day the defendant told him he had been for some days expecting him out to take possession, but the plaintiff was determined not to do so. In *Doe d. Baker vs. Wombwell*, 2 Camp. 559, it was ruled that a notice to quit at the expiration of the current year is good, and that was the effect of the parol notice in this case and determined the tenancy whenever the current year expired. A very different question would have arisen if the plaintiff could have shewn that he demanded possession on the 1st May, and that it had been refused until the 5th or 6th May, but nothing of that kind was done. Then as to the notice in writing being a waiver of the previous parol notice, a question precisely similar arose in *Doe d. Savage vs. Stapleton*, 3 Case and p. 275, when one notice was in time, and the other was not, and it was contended, as in this case, that the effect and operation of the two notices shewing the terms on which the parties stood, was a question for the jury; but the court thought otherwise, and directed a verdict for the plaintiff upon the notice which was served in time Upon

these grounds we are of opinion that in point of law the defendant was not liable in this action, while the merits, as far as they were disclosed in this case, were, in our judgments, all at his side. The application must, therefore, be refused.

Acting Solicitor General (H. Hoyles) for plaintiff

Mr. Robinson, Q. C., for defendant

WHITE v. GRIEVE ET AL.

1854, *January*. BY THE COURT.

Practice—New trial—Verdict contrary to evidence—Excessive damages.

There is no power in the Court to disturb, impeach or question the conclusion the jury arrive at, unless the verdict is plainly one against justice.

It is the exclusive province of the jury to determine on which side the weight of evidence preponderates.

IN this case an application has been made for a new trial on two grounds; first, that the verdict was contrary to evidence; and secondly, that the damages were excessive. The questions involved in this case were solely questions of fact upon which it was the province of the jury to decide. They had a mass of evidence before them on behalf of both parties, and upon a deliberate consideration of that evidence they have arrived at a result favorable to the plaintiff, and we have no right to disturb, impeach or question the conclusion at which they arrived, unless we were satisfied that the verdict was one plainly against justice. In a case like the present, where there is evidence to sustain the case of each party, it is the exclusive province of the jury to determine in whose favor the evidence, in their judgments, preponderates; and, where, as in this case also, there is conflicting testimony it is likewise the exclusive province of the jury to determine the evidence to which they will give credit and to reject such as they disbelieve, and when the jury only exercise these functions the court has no right to disturb their verdict. With respect to the amount of damages, the only evidence upon that subject was that given on the part of the plaintiff, and that evidence warranted the verdict of the jury. In addition to that fact, the defendants raised no substantial question at the trial upon the amount of the damages, but submitted that they were not liable for any amount whatever. Upon these grounds we must refuse the application for a new trial.

1854, January. BY THE COURT.

Executor—Action against—Negligence, mis-conduct, breach of trust—Liability of co-executor for contribution—Evidence, formal decree, final decree, what necessary to admit in evidence.

In an action against co-executors a verdict was obtained by the plaintiff. One of the defendant co-executors paid under a decree of court the amount so recovered. In an action against his co-executor for a contribution of a moiety of the sum so paid, it was contended that the recovery of the amount of the decree having been had upon the ground of negligence the case was not one in which contribution could be enforced.

Held—That whilst a plaintiff if he recover in an action of tort against two defendants and levy against one, that one cannot recover a moiety against the other for his contribution; but it is otherwise in an action such as the present, which was in *assumpsit*, a liability for a breach of trust as executor, and one in which the right to contribution prevails.

A decretal order may be read at the trial and admitted in evidence on proof of the bill and answer.

When a decree does not reserve the consideration of the points of equity or of the further direction consequent upon the master's report or the costs of the suit, it is a final decree.

THIS was an action of *assumpsit* brought by the plaintiff to recover the sum of £478 6s. 3½d. from the defendant, being one-half the amount which the plaintiff paid under a decree of this court in a suit instituted by one John Gushue against the present plaintiff and defendant as the executors of his father's will. The decree against these parties proceeded upon the ground of their negligence and misconduct as such executors. At the trial the plaintiff obtained a verdict for the amount mentioned above, subject to certain points saved on behalf of the defendant, and subsequently Mr. Robinson obtained a rule for a non-suit, against which Mr. Hoyles shewed cause last term. The points relied on were: first, that there was no decree formally drawn up and under the seal of the court given in evidence; secondly, that there was no *final* decree given in evidence, the amount which the defendants were to pay not having been ascertained until after the only decree that was proved had been pronounced; and thirdly, that the recovery of the amount of the decree having been had upon the ground of *negligence*, the case was not one in which contribution could be enforced. The original bill, the joint answer of the present plaintiff and defendant, the decree, the master's report, the rule to confirm the master's report, the rule refusing

a re-hearing, and the rule on consent, referring the accounts to the master prior to the decree, were all read in evidence at the trial. The decree was in these words: "this cause coming on, &c, the Court doth order and decree that the defendants shall stand charged in account with the complainant with the sum of £95 currency, short credit on the vessel and sale mentioned in the complainant's bill, with interest thereon, at the rate of three *per cent. per annum* from the time of her sale; that they be also charged with the sum of £300 sterling, removed by them from the hands of Messrs. Gosse, Pack & Fryer, and placed in the hands of C. Cozens, Esq., with interest thereon, at the rate aforesaid, from the time of such removal; that they be also charged with the balance of account reported against them by the master exclusive of the said sum of £300, and of the remainder of the monies of the said estate in the hands of the said C. Cozens at the time of his failure; that they be also charged with the dividend payable, pursuant to the master's report, upon the said remainder of the monies of the said estate in the hands of the said C. Cozens at the time of his failure; that they be not charged with the amount of monies of said estate in the hands of the said C. Cozens at the time of his failure beyond the sum of £300 and the dividend aforesaid; that they be allowed in such account for all sums of money necessarily expended in carrying out the trusts of the will and in relation to their management of the trust fund, and the costs to be taxed by the master of the defence of the suit instituted against them by the mother of the said complainant; and that the costs of the defence in the suit instituted by Robert Brown against the defendants shall be in the discretion of the master, and *that the amount due to the complainant by the defendants on this account, and the costs of this suit, shall be paid by them to the complainant.*"

Upon the 23rd March, 1853, the master made his report under this decree, and thereby reported that the sum of £818 16s. 3d. currency was due by the defendants to the complainant on foot of the accounts, and £119 18s. 10d. sterling for costs, and that report was confirmed by an order of the 4th of April, no exception having been taken to it.

As to the first objection, no authority was referred to which decided that the decree should be made up in favour, and be either under seal or enrolled, for the purpose for which it was given in evidence in this case, viz, to show the obligation imposed thereby upon the plaintiff and the defendant in this

action in respect to the plaintiff in the suit in equity. On the contrary, we find it laid down in *1 Starkie on Evidence*, 254, that "A decreetal order in paper may be read on proof of the bill and answer," which is precisely what was done in this case, and for that position *Starkie* refers to *1 Keb. 21*, and *Com. Dig. Ev. C.* Again, in *Jones vs. Randell*, *Comp. 17*, Lord Mansfield said, "A judgment of the House of Lords may be proved by means of a copy of the minute-book of the House of Lords, for the minutes of the judgment are the solemn judgment itself." We are, on these grounds, of opinion that the evidence in this case was properly received. With respect to the second objection, that this decree was not a *final* decree, it would, perhaps, be deemed sufficient to refer to the definition of a *final* decree, in contra-distinction to an interlocutory decree, in treatises of authority. In *2 Dau. C. P.*, 984, it is said "When a decree does not reserve the consideration of the *points of equity* arising upon the determination of the legal rights of the parties, or of the further directions consequent upon the master's report, or the costs of the suit, it is said to be a *final* decree." Nothing of the kind is reserved by the decree which has been proved in this case, and it is a final decree unquestionably within the definition I have just read.

Three cases were cited by Mr. Robinson to shew that this was not a final decree, which it is right to notice from the confidence with which they were relied on in the argument. The first case was *Smith vs. Haskins*, *2 Atk.*, 384, which merely decides that a decree like that proved in this case is not *final* until the master's report is confirmed. The counsel who argued against its being a final decree in that case merely contended that the decree "cannot be called a final decree until the master's report is confirmed"; and the Lord Chancellor said "when the order is made absolute (that is, to confirm the master's report) the money is to be paid to the person reported to be entitled." That case, therefore, is in truth a very strong authority to shew that the decree proved in this case was a final decree, because it decides that the order to confirm the master's report makes such decrees final, and that order was proved in this case. The case of *Perry vs. Philips* was next cited for the same purpose, but we are at a loss to imagine how that case could apply to the present, the decree in that case being, by its own *express* terms, not final, for it contained the words "reserving further directions" until the return of the master's report. The only other case cited upon this point was *Morrice*

vs. Bank of England, Cus. T. Talbot, 218, which we find on reading it, to be an express authority for holding the decree in the present case a final decree. In *Smith vs. Haskins Hardwicke* said "The difference between a decree *quod computet* and a final decree was taken and settled in the case of *Morrice vs. Bank of England*; the latter may, therefore, be regarded as the leading case on this subject. In that case the decrees were in these words 'that the defendant should pay *what was certified by the master* (after an account was taken) out of the assets in a course of administration"; precisely the form of the decree in the present case, and these decrees were held in that case to be *final* decrees and equivalent to *judgments at law*.

Upon these grounds we are clearly of opinion that this objection is wholly untenable. The last objection rests upon the distinction which exists as to the cases in which one defendant has a right to contribution as against a co-defendant for a sum recovered against them, and which he has paid, and those in which that right does not prevail. In *Merryweather vs. Nixon, 8 T. R. 186*, the distinction is noticed, and it is said that if a plaintiff recover in an action of *tort* against two defendants and levy the whole damages on one, that one cannot recover a moiety against the other for his contribution, but it is *otherwise* where the recovery against the two was in *assumpsit*. The recovery in the present case is not a recovery of damages for a *tort*, or for negligence which amounts to a *tort*, or for anything analagous to these; but it is a decree for a sum of money for which both the defendants have been held liable for a breach of trust as executors, a proceeding not differing materially from an action of *assumpsit* upon their *implied* promise to act diligently and with integrity in the trusts which they had undertaken to execute. In *Addison on Contr., 210*, it is said "The law *implies* also from all persons who undertake any duty, charge, office, employment, or *trust*, a *promise* to act with integrity and diligence, and proper and reasonable care, in the execution of such duty, trust or employment." It is for breach of this *implied promise* that the plaintiff and the defendant were decreed to pay the sum of £956 12s. 7d., and, therefore, the case is manifestly one in which, upon the authority of all the cases, the right to contribution ought to prevail.

Upon all these grounds we are of opinion that the rule for a non-suit ought to be discharged.

Mr. H. Hoyles for plaintiff.

Mr. Robinson, Q. C., for defendant.

1854, January. BRADY, C. J.; SIMMS, J.; CARTER, J.

Trust deed—Absence of words of limitation—Power of sale in representative of deceased Trustee—Extinguishment of power of sale by death of Trustee.

There is no power transmissible to the representative of the donee of the power either to his heir, executor, administrator or assign, where such representative was not mentioned in the words creating the power. Where the Trust deed designates or marks out no person other than the Trustee as a donee of the power it cannot go to his heir, executor, administrator or assign, but with his death it becomes extinct.

The grounds upon which powers of sale are given is personal confidence in the donee of the power, and the intention that such powers will extend to persons other than those named as the donees of the power will not be presumed.

THE bill in this cause was filed to compel Mr. Noad to sell certain property vested in him as the executor of George Lilly, deceased, and to compel the other defendants to assent to such sale. The bill stated that by indenture of the 11th October, 1830, between Emma Gaden of the one part, and George Lilly of the other part, the said Emma Gaden did sell and assign "unto the said George Lilly, but to the use and for the benefit and behoof of and in trust for" her seven children and their husbands (naming them) "their and each of their heirs, executors, administrators, and assigns, in equal parts, shares and proportions, all that piece or parcel of land situate," &c., "to have and to hold the same in trust as aforesaid for ever. The bill then stated this proviso: "Provided always, and should it be necessary for the purposes and to the uses of the before-named children of the said Emma Gaden to sell and dispose of the said piece or parcel of land and premises, the said Emma Gaden or any two of the before-named children of her the said Emma Gaden or of the husbands of the said children assenting thereto in writing, it shall and may be lawful for him the said George Lilly to sell, assign, &c., the said piece or parcel of land and premises, and in due form of law to execute and deliver all needful and necessary title thereto, and to give and grant good and sufficient discharges or releases for payment thereof (all reasonable and fair charges and expenses being first paid) divide, distribute, and pay to and amongst" the said children or their husbands "their and each of their heirs, executors, administrators, or assigns, in equal parts, shares and proportions." The bill then set forth a covenant for good title by said Emma Gaden, and for the quiet enjoyment of the said George Lilly "in trust as aforesaid, and his assigns," and a covenant by "the said

George Lilly for himself, his heirs, executors, administrators and assigns, to and with the said Emma Gaden and her assigns, that he would take on himself and faithfully discharge the trust thereby intended to be raised by the said Emma Gaden to the use and for the benefit of her said children, their and each of their heirs, executors, administrators, or assigns." It further appeared that George Lilly, the trustee in the said indenture, departed this life intestate, and that letters of administration to his estate and effects were granted in the year 1846 to the defendant, Mr. Noad. No sale of this property was sought for in the life time of Mr. Lilly; several of the *cestui que* trusts have sold their shares and the plaintiff is assignee of the shares of two children, and the children who have not, and the assignees of those who have, assigned, are the other defendants in this suit. Amongst the questions that were discussed at the hearing of this cause, there was one which renders it unnecessary to state the further proceedings, because that question depends altogether upon the construction we give to the deed of the 11th October, 1830, and to the power of sale contained therein as stated above. It was contended by Mr. Hoyles, on behalf of the plaintiff, that the power of sale devolved upon Mr. Noad as the personal representative of George Lilly, while it was argued on behalf of the defendants that the power was extinguished by the death of George Lilly, and as we have come to the latter conclusion, the sale cannot be enforced, and the bill must be dismissed. No authority was cited to sustain the position contended for by Mr. Hoyles, that a power was transmissible to the representatives of the donee of the power, either to his heir, executor, administrator, or assign, where such representative was not mentioned in the words creating the power; but Mr. Carter, as counsel for one of the defendants, referred to *1 Mad. c. p. 756*, where the very contrary is laid down as the law upon this subject. It is there said "If one by will directs his executor to sell his lands, and dies, and that executor makes an executor, the executor of the executor cannot sell; because the first executor had that power as an authority several from his executorship; and although the first refused to act as executor, he might yet have sold the land. And if the testator had willed that the Chief Justice should sell his land, though he resigned his office, and another Chief Justice was placed therein, yet the first should sell the land, and if he died, his heir could not sell it, the trust being determined." The only answer given to this passage by Mr. Hoyles was, that it referred to

naked power, and he argued that the rule was otherwise when the power was coupled with an interest. However that argument may apply to the case put as to the Chief Justice, it cannot apply to the case put respecting the executor, for the power given to the executor was a power coupled with an interest just as much as the power in the present case is: the instrument which created this power vested in the executor the testator's property as a trustee, precisely as the deed vested Emma Gaden's property in George Lilly. There is, no doubt, a difference between a "bare trust or naked power, and a trust or power coupled with an interest," as if a person gives to two or more persons a mere power to sell an estate, as for payment of debts, if one should happen to die before the sale had been carried into effect, the trust was extinguished; whereas if the testator *devised the estate* to two or more persons to sell for payment of debts, then as the trust was not a naked power, but a power coupled with an interest, it has been considered that the power, being annexed to the estate, was intended to *survive with it*, that is, continue to exist in the survivors or survivor of those expressly named as the *donees* or the power; but that is a very different thing from saying that the power is *transmissible* to parties like heirs, executors, administrators or assigns, who are not named or mentioned in the language creating the power. The case of *Cole vs. Wade*, 16 Ves. 27, is a strong authority to show a power, although coupled with an interest, is not transmissible. The testator in that case devised all his estate to his executors with a direction to dispose of the residue thereof unto and amongst such of his relations and kindred, in such proportions, manner, and form, as his executors should think proper, and Sir William Grant thus states the questions he had to decide in that case: "A disposition of this kind contains a mixture of trust and power. The trust must be exercised for relations and kindred of some description or other. The power of selection belongs to those to whom the testator has thought fit to confide it. Whether there is any person now entitled to exercise the power, is the principal question; but a trust exists equally in whichever way that question may be determined. If there is any person entitled to exercise the power, the trust will be for those of the relations and kindred whom such person shall select; if the power is extinct, the trust is for those who answer the description of relations and kindred, according to the construction this court may put upon these words. The will makes a complete disposition of all the real, as well as all the personal, estate

upon a trust to be executed in one or other of the modes I have mentioned. The question is, "in which of those modes the trust is to be executed?" We may adopt nearly every word of these observations as the statement of the questions we have to decide. There were two modes in which the trust in the present case might have been executed, one by holding the property in trust for the children of Mrs. Gaden, the other by a sale of the property by George Lilly, with the assent mentioned in the deed, and a distribution of the proceeds of such sale amongst the children. The object of this suit is to have the trust executed in the latter mode, and if the power to sell is extinct by the death of George Lilly, it is manifest that the trust cannot be so executed. After referring to several cases, including cases of powers of sale, to establish that such powers *will not pass with the trust* from the original trustees, (without express words to others) to whom, by legal transmission, the same character may belong, Sir W. Grant said "the power is not appendant to the estate; by itself it is incapable of alienation; and it is ONLY *quasi persona designata* that it can go to the heir." There is no person, with the exception of George Lilly, designated or marked out as a donee of the power in the present case, and therefore it could not go to his heir, executor, administrator, or assign, but with the death of George Lilly it became extinct.

We will only observe that the ground upon which powers of sale, like the power in this case, are given, is personal confidence in the donee of the power, and the intention that such powers should extend to other persons than the individuals or individual in whom that confidence was reposed, and who are or is named as the donees or donee of the power ought not to be presumed; but from a careful consideration of the terms of the deed in this case, we are of opinion that, upon the face of that deed, a manifest intention is apparent to intrust the power of sale to George Lilly alone, and that the words of limitation, as heirs, executors, &c., were advisedly omitted. It was said that this trust or power to sell was *imperative*, and that Mrs. Gaden in her lifetime, or any two of the *cestui que* trusts giving their assent in writing to a sale could compel Mr. Lilly to sell this property; but that is a great mistake. Mr. Lilly was trustee, for Mrs. Gaden's children, of a property which she had vested in him for their benefit, and because she has said that he might sell it if he had her assent in writing, it is gravely argued that this would enable her to compel him to do so, although and the

seven *cestui que trusts* were opposed to such a disposition of the property. The intention and meaning seems too plain to admit of cavil; it shows, merely, that the power of sale was given cautiously, for while Mrs. Gaden gave this power to Mr. Lilly, it was not an absolute power, but one which he could only exercise with the assent mentioned in the deed.

Upon these grounds, the bill must be dismissed with costs.

Mr. Hoyles for plaintiff.

Mr. F. B. T. Carter for defendant.

DO DEM. POWER v. McBRIDE ET AL.

1854, *January*. HON. SIR F. BRADY, C. J.

Practice—Rule nisi to set aside non-suit—Landlord and tenant—Ejectment, party in whom right to maintain.

The party in whom the estate is vested can alone maintain an action of ejectment.

THE Acting Solicitor General in showing cause to set aside the non-suit and obtain a new trial, said, this is an action of ejectment, brought by the plaintiff against the defendant, in the December term last. After the examination of a few witnesses, it was shown that the plaintiff had no right of entry, having leased the property to a person of the name of Clooney; upon which plaintiff was non-suited.

With reference to the question of Clooney's lease, there can be no doubt of its operation, as Clooney held all the property Dollard held under his lease from Power, which lease Dollard assigned to Clooney.

It is contended by the learned counsel for the plaintiff, Mr. Little, that the question of parcel or no parcel, ought to be left to the jury, whereas I contend that the point does not arise in this case, as the plaintiff clearly could not maintain an action for that which he had parted with to another; besides this was a question for the Court, and not for the jury, and the Court very properly ruled that it had no application to this case. But it is said, Power has a right to maintain this action, notwithstanding the lease to Clooney, and authorities were relied on to show that Clooney could not maintain the action, not

being in possession, (2, *Platt on Leases*, p. 22) and that Clooney having surrendered his lease from Dollard to Power, and Power having given him a new lease, Clooney could not maintain an action as he had never made an entry upon the disputed property, and possession of a part could not be construed into a possession of the whole, as the defendant held adversely. But this is not the law as in reference to the case referred to in *Platt*, *Saffins* case, 3 *Coke's Reports*, 253, the principle is not borne out, and if not borne out in that case, I presume the dictum laid down by Woodfall is equally erroneous; it is therefore clear that Clooney can maintain this action without entry, having the right to the possession, besides, the consent rule admits the lease entry and ouster. *Williams v. Besangut, Bro., and Brien, Rep. 242*. (By the Court: "The question is this: whether Power could demise to Clooney property which was not in his possession at the time of the demise." Mr. Hoyles: Clooney's possession was the possession of Dollard, who assigned to him and therefore upon the surrender by Clooney to Power, he Power, was by construction in possession. But I submit I am not bound to show that Clooney can maintain the action, my business is to show that Power has no right to maintain it, and if so, the difficulty is easily got rid of by Clooney executing a lease to Power, which will clothe him with the right sought. For all these reasons I submit that the rule should be discharged.

P. F. LITTLE, Esq., on the part of the plaintiff, stated that in the year 1824 the plaintiff granted to a person of the name of Thomas Dollard a lease of premises on the south side for twenty one years which expired in the year 1845. During the time Dollard held possession, in the year 1830 or 1832, an encroachment took place and in 1835 Dollard handed over his lease without assignment to Clooney. That Dollard never delivered possession of the encroachment to Clooney, but the defendant kept possession from that time to the present. Clooney surrendered to Power, and in 1840 Power executed a lease to Clooney. Under this lease there was only leased to Clooney so much as he had formerly held and which had been held by Dollard from the year 1830 or 1832, the encroachment never having been in the possession of Clooney. The description of the property in the lease runs thus: "All that fishing room on the south side of this harbor, late in the occupancy of the said Patrick Clooney and previously in the occupancy of Thomas Dollard." This description is both general and particular, and

it is clearly laid down that a particular description contains a general description.—2, *Platt on leases*, p. 28; *Crabb on rule property*, p. 247.

Dollard being out of possession in 1835 of the encroached grounds, and having made no entry thereon before he assigned his lease to Clooney, he could not assign an estate in possession to the encroached ground to Clooney. This principle is laid down in *Woodfall L. & T.*, p. 344, 1, *Platt on Leases*, p. 50. It is clear that under the lease from Dollard, Clooney could not maintain ejectment for the encroached ground and the surrender thereof to Power; and acceptance of a new lease only increased the difficulty owing to the description of the premises therein contained. Until Clooney made entry on the encroached ground, although Power had the right of entry, no estate therein vested in him, and he, therefore, could not maintain an action of ejectment. To sustain this position the learned gentleman referred to the following cases: *Saffin's case*, 4 *Coke, Reports* 250; *Woodfall's Lan & Ten.*, p. 114 and 15; 3 *Crabb*, 255; *Doe dem Rawlins & Walker*; 5 *Bar. & Cres.*, 111; 1 *Bar & Ald.*, 593; 1 *Coke's first In.*, 59. For these reasons the learned gentleman submitted that the non-suit should be set aside and a new trial had.

The Chief Justice delivered the judgment of the Court in this cause in favor of the plaintiff, on the ground that as he was not in possession of that part of the premises, on making the lease to Clooney, which forms the subject of this action, and which, it is stated, was encroached upon by defendants in 1830 or in 1832, and has been since in their occupation, the estate therein could not be vested by the lease in the lessee, and consequently the latter could not maintain ejectment. The estate in the disputed part of the premises, therefore, remaining in the lessor he alone could maintain this action. In support of this position His Lordship cited several of the authorities from *Woodfall's Landlord and Tenant* and *Crabb on Real Property*. The rule nisi to set aside the non-suit and grant a new trial was accordingly made absolute.

Mr. P. F. Little for plaintiff.

Mr. H. Hoyles (*Acting Solicitor General*) for defendant.

1854, *January*. HON. SIR F. BRADY, C. J.

*Practice—Rule nisi to set aside verdict—Improper rejection of evidence—
Landlord and tenant—Evidence to vary or alter a written lease—
Mistake in description in body of lease.*

Evidence will not be admitted at the trial to contradict the terms of a written document, nor are declarations of the lessor made some time after the execution of the lease, and the delivery of possession of the *locus in quo* to the lessee evidence.

THE following rule was obtained by the Acting Solicitor General to set aside the verdict. It is ordered that the verdict in this rule be set aside and a new trial had on the ground of the improper rejection of evidence (points reserved at the trial), unless cause be shown to the contrary within four days.

Upon this rule Mr. Little showed cause, and said that this was an action of trespass for encroachment on waterside premises leased to the plaintiff by a person of the name of Barron. The encroachment consists of six feet on the waterside, extending up the centre and narrowing as it went up. Mr. Boyd, Mr. McDougall, and Mr. Rogerson, parties who had formerly been tenants of the property, and several parties who knew the ancient boundaries, were examined on the trial, and from the evidence of the first named gentleman it appeared that the encroachment only extended two and a-half feet in front and one foot towards the centre. Mr. Prowse, who was examined on the part of the defence, was called to prove some conversation between Mrs. Barron and John Stuart, the original lessee—this conversation having taken place after the execution of the lease and after Stuart had got into possession, I objected to Prowse giving any evidence of the conversation on these grounds and the ground that it was not competent for the plaintiff to give evidence of an admission on the part of Mrs. Barron that went to vary or alter the terms of the written document—the lease. This objection was assented to by the Court, and the evidence tendered was not permitted to be given. The ruling of the Court at the trial is fully sustained by the decision lately pronounced by the Central Circuit Court in the case of *Prowse v. Wingfield*, in *Roscoe*, p. 42 & 43; *Crear v. Barrett*, 1 C. M. & R. 919, and 5 Bing. 171. These cases, said the learned gentleman, sufficiently prove the correctness of the principle laid down by the Court at the trial, and I therefore submit that the rule ought to be discharged.

The Acting Solicitor General on the part of the defendants said the encroachment contested for in this case was confined to the waterside and not to the front, which was occupied by brick buildings. The plaintiff's case was this: that he held under a lease from Mrs. Barron, and that he was not in possession of the whole of the waterside as described in his lease. On the back of the lease was a diagram which shows the measurement $37\frac{1}{2}$ feet at high water mark; whereas the measurement mentioned in the body of the lease is stated as $37\frac{1}{2}$ feet at low water mark. This is a mistake, as the defendant contends, and should have been described in the body of the lease as on the diagram. Mr. Prowse stated at the trial that the mistake was discovered by him, and pointed out to Mrs. Barron, who agreed with him and instructed him to alter it. This evidence the Court refused to admit, and as I submit improperly. In courts of law and equity evidence to show a mistake is admitted, and although it is true to correct that mistake resort must be had to a court of equity, the fact of the mistake is always evidence in a court of law. To sustain this position the learned gentleman referred to *Starkey on Evidence*, p. 556; *Roscoe*, p. 13, and *Skipwith v. Green*, 1 *Stra.* 610. If in any case, the learned gentleman went on to say, the principle contended for ought to be applied, it is this, as on the trial it was proven that the plaintiff was in possession of an old plan which he refused (although notice to produce was given) to produce. On the trial I asked Mr. Prowse what land he put Mr. Stuart in possession of, and the question was over-ruled by the Court. I submit I had a right to put this question on the principle of parcel or no parcel, as laid down in *Roscoe*, p. 18, and *Cook vs. Booth*, *Cowper's Rep.*, p. 819. I also sought to prove an admission made by Mrs. Barron, before the execution of the lease, with reference to the boundaries, but this also was over-ruled. Now it is clear that although admissions made by her after the execution of the lease may not be evidence, yet declarations before the execution are clearly so. For all these reasons, I submit the verdict ought to be set aside, and a new trial granted.

The Chief Justice delivered judgment in this case in favour of the plaintiff, stating that the Court were of opinion, first, that according to their recent judgment in *Prowse vs. Wingfield*, the evidence attempted to be put on the trial to contradict the terms, was properly rejected; as were also the declarations of the *Lessor* made sometime after the execution of the *Lease* and the delivery of possession of the *locus in quo* to the *Lessee*; and,

lastly, that the merits were entirely in favour of the plaintiff; and the Court concurring in the justice of the verdict, accordingly discharged the rule.

Mr. P. F. Little for plaintiff.

Hon. H. Hoyles (Acting Solicitor General) for defendant.

FEEHAN v. McLEAN ET AL.

1854, *January*. HON. SIR F. BRADY, C. J.

Vendor and purchaser—Warranty, breach of—Deceit—Sale of ship—Tonnage—Practice—Rule nisi to set aside verdict—Verdict contrary to evidence.

The defendants, by public advertisement, offered for sale their ship *Lena*, burden per register 159 tons. The plaintiff purchased the same by bill of sale, which set forth she was of the burden of 159 tons. After the sale had taken place the ship was officially measured for a new register, when it was found she was only of the burden of 147 tons. In an action for breach of warranty, deceit and misrepresentation the jury found for the defendants. On a rule nisi to set aside the verdict as contrary to evidence.

Held—The rule must be discharged. Even if the jury believed the tonnage was less than that stated in the register, they were warranted in finding for the defendants, in that the latter made no absolute representation as to the tonnage of the vessel but only of her tonnage as ascertained by her register, which is the foundation for all subsequent contracts in relation to that vessel.

THIS was a special action on the case for deceit in having sold the plaintiff a vessel called the *Lena* for the sum of nine hundred pounds, which vessel was alleged by the defendants in the bill of sale thereof to the plaintiff to be of the burthen of one hundred and fifty-nine tons; whereas upon her being re-measured by the Customs officer at this port (Mr. Hayward) her actual measurement turned out to be one hundred and forty-seven tons—twelve tons short. The case was tried by a special jury, who found a verdict for the defendant.

Mr. Little, on December 15th, moved for a rule nisi for a new trial upon the ground that the verdict was contrary to evidence and to law. The learned gentleman argued that the verdict was contrary to evidence because, without intending to impeach the testimony of the custom-house officer at Pictou, that evidence was taken under a commission, by which the questions put to witness were reduced to writing, and that under such a mode of examination it was impossible to be as particular with

reference to the mode and the circumstances attending the measurement of the vessel at Pictou as in a *viva voce* examination; and that Mr. Hayward's evidence had this decided advantage over the other, that he was present at the trial and every minute particular attending his measurement was inquired into.

As to the verdict being contrary to law, nothing could be clearer. The plaintiff in this case, at the trial, did not charge the defendant with a wilfully fraudulent misrepresentation, nor did he intend to do so now, as it was not necessary to sustain this action, because it has been clearly laid down that it signifies nothing whether a man represents a thing to be different to what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false, the party making such representation is, both in morality and law, guilty of falsehood and must answer in damages. The learned gentleman cited *Anderson v. Jarvis*, 4 Bing. Rep. 73, and *Sclinder v. Heath*, 3 Camp. Rep. 506. Nor does the advertisement offering her for sale aid the defendants by stating "the tonnage as per register," for that is inserted as an understood guarantee that she is of that tonnage, besides which the action is based on the express warranty in the bill of sale, as well as the representations of the agent of the defendant.

THE CHIEF JUSTICE:

This was an action on the case for alleged misrepresentation and breach of warranty on the part of the defendants in the sale of a vessel purchased from them by the plaintiff. The declaration contained two counts, the first averred "that the plaintiff, to wit, on, &c., at, &c., at the special instance and request of the defendants, bargained to buy of them, the said defendants, a certain ship or brigantine called, the *Lena*, for £900, and the said defendants by falsely and fraudulently warranting the said ship to be of the burthen and tonnage of 159¹⁵⁰¹/₃₃₀₀ tons, then and there sold the said ship to the plaintiff for £900; whereas in truth and in fact the said ship was, at the time of the said warranty thereof, and still is, only of the burthen and tonnage of 147¹⁵⁰¹/₃₃₀₀ tons, and that the defendants, by means of the premises, falsely and fraudulently deceived the plaintiff on the sale of the said ship." The second count did not materially differ from the first, except in averring that the defendants well knew the falsehood of the representation and warranty, which document was not supported by any evidence. It appeared in evidence tha

the defendants resided in Nova Scotia, where they built the *Lena*; that she was registered at Pictou, in Nova Scotia, and sent to Messrs. McKay & McKenzie of this town to be sold; and that they published in the *Morning Post* the following advertisement respecting her: "On sale.—The fine brigantine *Lena*, of Pictou. Burthen per register $159\frac{1501}{3500}$ tons; built of the very best materials, &c.—Apply to McKay & McKenzie." Mr. Smith, one of the agents, proved that the plaintiff applied to him about the vessel, and that he represented her and sold her to him by her register; that he read the register for the plaintiff; that the representations were true as far as he knew; that all he knew about the vessel was from the register. The bill of sale was also read, and thereby the defendants, "the sole owners of the *Lena*, in consideration of £900, granted, sold, &c., to Pierce Feehan, his executors, &c., that good ship called the *Lena*, of Pictou, which is of the burthen of $159\frac{1501}{3500}$ tons, and all and singular the masts, &c.; which said ship has been duly registered pursuant to an Act of Parliament for that purpose, and a transcript of the certificate of such registry is as follows: It then set forth at length the certificate, which contained in reference to the question in this case this statement, "which (ship) is of the burthen of one hundred and fifty-nine $\frac{1501}{3500}$ tons," and this certificate was signed "Wm. Robertson, Controller," he being the officer at Pictou, in Nova Scotia. Mr. Hayward, the controller of customs at this port, was then called, and he stated that the plaintiff applied to him for a new register of the *Lena* after the sale, and that he then made an accurate measurement of her, and that she was only of the burthen and tonnage of $147\frac{1501}{3500}$ tons. This, with some further evidence to show that the tonnage of the *Lena* was not 159 tons, which it is not necessary to state, comprised the plaintiff's case.

On behalf of the defendants it was contended that there was no untrue representation made, because in the first place the representation of her tonnage was only that she was 159 tons "per register"; and secondly, that she was in fact of the tonnage represented in the register. To sustain the latter position the evidence of James Hamilton Lane, a searcher and clerk and surveyor of ships in her Majesty's customs at the port of Pictou, was produced and read from examinations taken *de bene esse*; and therein this witness, that he surveyed the *Lena*, that he found her tonnage to be $159\frac{1501}{3500}$ tons, and that he measured her correctly, according to the Act of Parliament, to the best of his knowledge and belief. The defendants gave in evidence

also the sale note, which was in these terms: "We hereby agree to sell to Captain Pierce Feehan the brigantine *Lena*, as she now lies in the stream, with all the gear belonging to her, and examined by the said Captain Feehan, for £900, payable as follows, &c. We agree to allow the two last payments to remain in the hands of Messrs. Bowring Brothers until we produce to the said Captain Feehan a true bill of sale from the registered owners."

Upon this evidence the court directed the jury that, if they were satisfied that the representations made by the agents of the defendants were untrue in fact, in a matter material to the contract, and that the plaintiff was misled thereby, the latter would be entitled to their verdict; if otherwise, they ought to find for the defendants. The case was tried by a special jury, who found a verdict for the defendants, and an application was subsequently made to set aside that verdict as contrary to evidence. At the trial the terms of the advertisement escaped the notice of the court, and we then believed that it stated the tonnage absolutely, and not as we subsequently discovered, "per register"; and we were of opinion that the terms of the sale note could not affect the terms of that absolute representation.

Looking at the whole of the case now, however, we are of opinion that, even if the jury believed the tonnage was less than that stated in the register, they were warranted in finding for the defendants on the ground that the latter made no absolute representation of the actual tonnage of the vessel, but only of her tonnage as ascertained by a public officer duly authorised for that purpose, and as set forth in a public document, which is, so long as it is in existence, the foundation for all subsequent contracts in relation to that vessel, and which was embodied in the plaintiff's bill of sale. Upon these grounds, and in the absence of any moral fraud, and of a knowledge on the part of the defendants of the deficiency in the tonnage of the vessel, if there were any, we are of opinion that the jury were warranted in finding for the defendants, and that the application to set aside the verdict ought to be refused.

We have not observed upon the affidavits used upon the motion, because the statements contained in them do not affect the view we have taken of the case, or the grounds upon which we conceive that the verdict ought not to be disturbed.

Mr. P. F. Little for plaintiff.

Mr. H. Hoyles (Acting Solicitor General) for defendants.

1854, *January*. BY THE COURT.

Customs—12 Victoria, Cap. 4—Seizure of goods for under value—Lien of master of ship for freight on goods seized.

In an action by the master of a ship against the collector of customs to recover the freight on goods carried in his vessel for an importer, which goods were seized by the collector after entry, on the ground of their being entered under value, it was contended the goods were taken subject to the master's lien for freight, and that the collector was bound to pay him the amount due him for the freight of the goods.

Held—There was no such liability in the defendant for freight. When the Customs seize goods under the Act there is no liability to the captain of the vessel for payment of freight, they take the goods without any liability attaching to them.

ACTION of assumpsit for freight of goods seized by the Customs as entered under value; question submitted for the opinion of the Court—whether under the terms of the statute 12 Vic., c. 4, sec. 7, the Customs upon the seizure of the goods is liable to the captain for the payment of the freight?

The Attorney General, for the defendant, contended that no such action as this could be sustained. The articles in question were taken by the defendant as a public officer, under the imperative provisions of an Act of the Legislature, 12 Vic., c. 4, sec. 7, which pointed out when and where and under what circumstances it was obligatory on the defendant to take such articles for the use of the Crown. The 3rd section of the Act, as well as the 7th, gave very extensive powers to the officers of the Customs to lock up, seal, mark, detain, secure, and in certain cases to take for the use of the Crown, goods in respect of which the revenue laws were violated, or not complied with. But if this must be at the hazard of the liens or claims of third parties, the law could not be enforced, and officers would never be safe in the discharge of their duty. The taking of the goods did not destroy the contract between the importer and the master, who still had this action for freight as well as for damages, if he incurred any by the default of the importer. It would be observed that the Act directed the repayment to the importer of the goods, when taken as having been in the judgment of the officer under valued, of the full amount of the valuation of ten per cent. additional, together with the duties; and he could not conceive why more than the importer's valuation should be returned to him, unless it was to cover freight. In one case with another this might be sufficient, although in some doubt-

less quite inadequate. But whether or not the ten per cent. was for freight, the words of the Act were clear and positive, and the officer had no option to disobey it; and the only requisites with which he was bound to comply were these mentioned in the section.

Mr. Robinson, for the plaintiff, stated that the goods seized by the Customs officer was a lot of paper imported in the ship *Camilla*, of which W. & H. Thomas & Co. were the consignees, and were seized as was stated owing to their having been entered under value. Supposing that the goods were entered under value, the section of the statute which authorized their seizure could not be looked upon as a penal clause—the value was a mere matter of calculation in which it was very easy for a mistake to arise. The section referred to has reference only to the importer or proprietor of the goods, and does not touch a third party like the plaintiff, who was master of the vessel and had a lien upon the goods seized for freight. When the Customs seize goods under the section referred to, I submit, it not being as I before stated a penal clause, that it takes the goods subject to all the liabilities attached to them, and stands with reference to them just as a private individual would were they in his possession. It is said that the ten per cent. in addition to the value paid the importer or proprietor, is intended to cover the freight; now that could not be, as in nine cases out of ten it would be wholly inadequate for that purpose. Take the article salt, for instance, the prime cost of which is not nearly equal to the amount of freight paid. Is the captain to lose his lien by the act of a party over whose conduct he has no control? It is said in *Abbott*, p. 377, that he does not lose his lien. If a captain lands goods pursuant to Act of Parliament he does not lose his lien,—*Wilson and others v. Kyner and others*, 1 M. & S.; in *Vatill*, vol. 3, ch. sec. 115, the same principle is laid down. The Imperial statute 26 Geo 3, cap. 13 & 17. provides for the seizure of under valued goods, and expressly prohibits the payment of freight; whereas our statute is silent upon the subject, being, as I submit, natural justice to operate in favor of so fair a claim as freight.

JUDGMENT.

This was an action of assumpsit brought by the plaintiff as master of a vessel, to recover the amount of the freight of certain articles imported by Messrs. Thomas & Co., in his vessel, against the defendant, as Collector of Her Majesty's Customs.

After the arrival of the vessel the usual entry of the goods was made by the importer, and it appearing to the officer of the Customs that the goods were not valued according to their true value, he seized them and took them away. Under these circumstances, the plaintiff insisted that the goods were taken subject to his lien for freight, and that the collector was bound to pay him the amount due to him for the freight of these goods. The seizure was made under the local Act, 12 Vic., cap. 4, sec 7, which enacts "that if upon examination it shall appear to the Collector, Landing Waiter, &c., that such articles are not valued according to the true value thereof, it shall be lawful for such collector, &c., to detain and secure such articles, and within three days from the landing thereof, to take such articles for the use of the crown, and the said collector or other officer shall thereupon in any such case, cause the amount of such valuation, with an addition of ten pounds per centum thereon, and also the duties paid upon such entry, to be paid to the importer or proprietor of such articles, *in full satisfaction for the same*, and shall dispose of such articles for the benefit of the crown; and if the produce of the sale of such articles shall exceed the sum so paid, and all charges so incurred by the crown, one moiety of the overplus shall be given to the officer or officers who shall have detained or taken such articles, and the other moiety detained for the benefit of the crown, shall be paid to the Treasurer of this island, to be applied to the public uses of the colony as the legislature shall direct." The language used in this section authorises a seizure of the goods "for the use of the crown," subject to certain specified obligations, which, in this instance, have been complied with, namely, the payment of the amount of the valuation put upon the goods, with an addition of ten pounds per cent. thereon, and also the duties paid upon such entry, to the importer or proprietor of such articles "in full satisfaction for the same" and "to dispose of some for the benefit of the crown." This enactment does not contain any stipulation or provision respecting freight, and what right therefore have we to impose that additional obligation upon the crown when its officers make a seizure under it? We conceive we have no such authority. It was argued that the intention of the legislature was that the crown should take the goods, as individuals would take them, subject to the Master's lien for his freight, but from a consideration of the several enactments on this subject, imperial and local, which have been all made *in pari materia*, and are to be taken together, we think a diffe-

rent intention must be inferred. The following sentence, from *Dwarres on Stat. 699*, expresses the rule of construction to which we refer: "As one part of a statute is properly called in, to help the construction of another part, and is fitly so expounded as to support and give effect, if possible, to the whole, so is the comparison of one law with other laws made by the same legislator, or upon the same subjects or relating expressly to the same point, enjoined for the same reason and attended with a like advantage." Both parts of this rule apply to the present case because, on reference to other sections of this Act, it will be seen that in other cases of seizure and sale of articles by the officers of customs, the payment of freight is expressly provided for, the fair inference from which is, that when the legislature intended to secure the payment of the freight, they made in several instances special provision respecting it. Thus in the 15th section it is enacted that if goods be not entered within twenty days, the proper officers may land and secure the same, and if the duties and other charges be not paid within three months "the same shall be sold, and the produce thereof shall be applied, *first to the payment of freight and charges*, and next of the duties, and the overplus, if any, shall be paid to the proprietor of the goods, or any other person authorised to receive the same." Then in reference to the second branch of the rule, the enactments contained in the imperial statute upon this subject are precisely similar. By the 8, 9 Vic., cap. 86, sec. 22, the officers of customs are authorised to take articles that have been undervalued in the entry, upon payment of the valuation and ten per cent. thereon, and also the duties thereon, in full satisfaction for the same," while by the 14th section, freight is expressly made the first lien upon the produce of the sale of articles seized for non-entry. So in the 6 Geo. 4, cap. 107, from which our local Act is copied, the language of the 20th section as to articles undervalued is precisely similar to the 7th section of our Act, while by section 16 freight is, as in the 8, 9 Vic., made the first lien on the produce of the sale of goods seized for non-entry; and by the 134th section, when goods are not cleared from the King's warehouse within a limited time, the proper officer may sell them, and freight is again expressly made a first lien on the produce of such sale. The inevitable conclusion from all this legislation is, that, in the particular seizure now under consideration, no express provision was intended to be made for freight, but that in lieu thereof the ten pounds per cent. was added to the valuation and paid to the

proprietor; and if that sum was not intended to be in lieu of freight, it is difficult to imagine for what other purpose the legislature would direct that sum to be paid to an importer or proprietor of goods which had been seized for a violation on his part of the Customs' Laws! Mr. Robinson referred to the 27 Geo. 3, cap. 13, in sustainment of the plaintiff's case. The 17th section authorises the seizure and sale of articles undervalued in the entry, subject to the payment of the valuation in the entry, together with ten pounds per cent. thereon and the duties to the importer or proprietor of the articles, "but without any further allowance, *either on account of freight or any other charge or expense whatever.*" The express introduction of the word "freight" into this statute and its omission in the analogous sections of the subsequent statutes, was insisted upon as raising an inference that the seizure was to be subject to freight under the later enactments. We cannot concur in that argument, but we are of opinion, that the legitimate effect to be given to this enactment strengthens the defendant's case. It establishes that, under that statute, the officer of the customs making a seizure of articles, as being under valued in the entry, did so subject to precisely the same obligations as he is now, and has been subject to under the subsequent enactments, and that he was then by *express terms* exempted from any liability in respect to freight; and there is nothing in the terms of the subsequent statutes to shew that the legislature intended to alter the law in that respect, or impose on the officers of the customs any additional obligation; they have omitted the word freight, but they have used language equally comprehensive as that contained in the 27 Geo. 3, by stating precisely the obligations under which the seizure shall be made, and that the performance of these shall be "in full satisfaction for the same" (the articles seized). Judgment for the defendant.

Mr. Robinson, Q. C., for plaintiff.

Hon. Attorney General for defendant.

1854, January. HON. SIR F. BRADY, C. J.

*Vendor and purchaser—Deed of sale of land—Covenant of good title—Breach—
Verbal evidence to vary deed—Character of plaintiff, necessity of
proof of—Eviction, necessity of proof of.*

In an action for breach of covenant of good title it was proven that the vendor was not the owner and had not the title in all of the land conveyed by his deed. The defence, amongst other grounds set up, was that notwithstanding the measurements in the deed did not correspond with the actual measurements of the land, that the variance was cured by the parties having, previous to the execution of the deed, agreed on a less quantity of land than that set out in the deed. At the trial the Court refused to admit evidence to vary terms of deed. The jury found for the plaintiff. On a rule for a new trial on the grounds: (1) Improper rejection of evidence; (2) No proof of death of party for whom plaintiff was administrator; (3) No proof of eviction;—

*Held—(Discharging the rule)—*Where a contract has been reduced into writing, verbal evidence will not be admitted (except to establish fraud) of what passed between the parties to the contract either before the written instrument was made or during the time it was in a state of preparation, so as to add to, subtract from, or in any manner vary or qualify.

*Held—*When there is no denial in the pleadings of the character in which the plaintiff sues it is admitted.

*Held—*In an action for breach of covenant for good title, eviction need not be proven; the averment is mere surplusage.

THIS was an action of covenant brought by the plaintiff for breach of a covenant for a good title contained in a deed of conveyance of a piece of land in Water street from the defendant to Rich Pearce in his lifetime. The declaration set forth the deed and the defendant's covenant in these words "that he (the defendant) had in himself, at the execution of the said indenture, good right, full power and authority to grant, sell, &c., the said land and premises unto the said Richard Pearce in the manner, &c.", and then laid the breach thus:—"Yet the defendant hath not performed or fulfilled the said covenant, &c., but, on the contrary thereof, the said defendant *had not at the time of such sale and assignment and date of such indenture, good right, full power and authority to grant, sell &c., the said land and premises so sold and pretended to be conveyed and assigned, but he avers, &c.*"; and the declaration then proceeds to allege a title in James Brine to a part of said premises and an eviction of the plaintiff therefrom by the said James Brine. To this declaration the defendant pleaded three pleas: 1st *Non est factum*; 2nd. A denial of the eviction; and 3rd. That the entry

of James Brine was lawful, because, &c.; and upon these pleas issue was joined. At the trial the deed of conveyance was proved, and the description of the premises therein was as follows:—"All that certain piece and parcel of land situate, &c., on the north side of Water street, measuring thereby twenty-four feet, and extending from front to rear thirty-four feet, bounded on the west by Studdy's land and land formerly the estate of the late James Stewart, and now belonging to James Brine; on the east by land of John B. Bulley, and in the rear by ground formerly of the estate of the late James Stewart, and now owned by James Brine, together with all buildings and erections thereon, all ways, easements, profits, &c., to the said piece or parcel of land belonging or in any wise appertaining." The letters of administration of Pearce's estate granted to the plaintiff were also read in evidence. It further appeared that after Pearce went into possession he put up a fence which enclosed a space making in the whole twenty-four feet by thirty-four feet, which fence James Brine soon afterwards knocked down because it encroached six feet upon his property, and his title to this portion he clearly proved at the trial, and that the defendant had no right or title to grant it. The premises were sold for £220, and evidence was given that the loss of the space, to which Brine proved title, would be from fifty pounds to sixty pounds. The defendant contended that before the execution of the deed, and during the negotiations for the sale of the property, it was the understanding and arrangement between the vendor and the vendee that the latter was to take only what the former had, or, as the witness expressed it, "It was agreed that Pearce was to take Wingfield's position towards Brine," to establish this position, that, as Wingfield had not this part from Brine, it was not the intention of either of the parties that it should be included in the property sold—evidence which I held to be inadmissible for any purpose except to prove fraud; and I told the jury that in this court the rights of parties who enter into solemn instruments, such as deeds and conveyances and agreements in writing, were to be adjudged by the terms contained in such documents when they were plain and unambiguous; that it was the province of the court to put their construction upon this instrument; that it was clear to me that it purported to convey a piece of land twenty-four feet by thirty-four feet; that the grantor had not title to so much, and having thereby failed to perform his covenant to give a good title for property

of that extent they ought to find for the plaintiff, leaving the amount of the damages to them. They found a verdict for the plaintiff for £10.

The defendant afterwards obtained a rule for a new trial upon the grounds that the verdict was contrary to evidence, that evidence was improperly rejected, that there was no evidence of Pearce's death, and lastly, that there was no evidence of an eviction in the plaintiff's time or since he obtained a grant of letters of administration. The two first objections rest upon the rejection of the parol evidence of what occurred prior to the execution of the deed, as any evidence to shew the extent of the land in respect to which the parties contracted. I am of opinion that the language of the deed is plain, and that I acted correctly in rejecting that evidence. So long ago as Lord Coke's time, that learned Judge said "It would be inconvenient that matters in writing, made by advice, and on consideration, and which *finally* import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory."—*5 Rep. 26*. And in modern times Lord Denman in *Goss v. Lord Nugent, 2 Nev. & M., 33*, thus laid down the law: "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify the written contract." Acting upon this rule I rejected the parol evidence, and now over-rule these two objections, being firmly persuaded that the court, by a rigid adherence to it, will best protect the rights of all contracting parties; and if it operate unjustly in particular cases it will be the fault of parties who enter into such written contracts, expressing one matter on the face of the document as the subject of the contract, while there is a private or oral understanding that is to vary the express terms of that agreement materially; instead of setting forth in the document, not a part, but the whole of their agreement, and thus preserve, during its existence, evidence of the mutual rights and obligations of the parties to it, without trusting to, as Lord Coke said, the "slippery memories" of witnesses while living to prove the true agreement to have been other than that expressed in the document, or to the possible chance of such witnesses having passed away before any dis-

pute or controversy had arisen respecting such agreement. As to the objection that no evidence of the death of Richard Pearce was given, I have only to state the rule upon the subject. "If the plaintiff's character of executor or administrator *be denied* by the pleadings, he must prove his title as executor or administrator. *The title of an executor is established by proof of the death of the testator and by the production of the probate.*" —2 Steph. on Pl. & Ev. 1904. In this case there was no denial pleaded and that dispensed with the evidence, the plaintiff's character as executor was admitted by the pleadings. With respect to the last objection that an eviction of the plaintiff was laid in the declaration, and the evidence proved an eviction not of the plaintiff but of Richard Pearce, Mr. Robinson for the plaintiff contended that the eviction of Pearce was a continuing evidence of the plaintiff. I should feel great difficulty in adopting that view, but upon another ground I am clearly of opinion that this objection ought not to prevail. The gist of this action is that the defendant had not the title to all the land which by his deed he purported to convey, and which he thereby covenanted he had good title to convey. It is not an action brought upon a covenant for quiet enjoyment where an eviction or disturbance in the possession of the property should have been laid in the declaration and proved at the trial; but in this case that averment in the declaration is surplusage and need not be proved, because mere evidence that a part of the property purported to be conveyed is the property of another, establishes a breach of the covenant for good title to convey the whole, without any evidence of eviction or disturbance. This rule is a sound and sensible one, for if the day after, or the year after, a purchaser has made a purchase, he discovers that the vendor had not title to a part but that another had, although that other had not disturbed him, he knows he may dispossess him at any time he pleases, and will perhaps when the purchaser has made improvements upon this part of the property. In accordance with that view I find the law thus laid down in a book of the highest authority. "In an action of covenant that the grantor had good right, full power and lawful authority to grant, it is held that the breach may be as general as the covenant, namely, that he had not good right, full power and lawful authority to grant *without stating any eviction on interruption.*" —2 Saunders Rep 181. That has been done in this case, and although an averment has been added of an eviction which has not been sustained by evidence, that does not affect what was

the real question at issue in this cause, viz, had the plaintiff title to the whole of the property for which he covenanted to give good title, and it was plain he had not. Upon these grounds, I am clearly of opinion that the verdict ought not to be disturbed, and that the rule for that purpose must be discharged.

IN RE INSOLVENCY OF ROBERT RUTHERFORD.*

1854, July. BY THE COURT.

Insolvency—English Bankruptcy Law—Application to Newfoundland—Bankrupt residing in Newfoundland declared bankrupt in England—Jurisdiction of Bankruptcy Court in England over assets in Newfoundland.

On the 7th of May by petition of creditors an order was made by a judge of the Supreme Court of Newfoundland appointing the Registrar of the Court provisional trustee of the estate of the insolvent, then in England. On an application made on the 18th of the same month, it appeared that the insolvent had been on the 19th of the previous month adjudged bankrupt in England, and his estate vested in trustees there. On an application of the English trustee, a judge of the Supreme Court of Newfoundland ordered the provisional trustee to hand over to the former all of the assets of the bankrupt in this Colony which had come into his hands. On application to the full Court to set this order aside, on the ground that the assignees of the Court of Bankruptcy in England had no legal rights to the assets in Newfoundland, and they should be distributed under the order of the Newfoundland Court.

Held—The order made was correct, and ought not to be disturbed.

IN this case an application was made to set aside an order that I made in chambers on the 19th of May last. In March last a writ of attachment issued against the petitioner at the suit of J. H. Cozens, under which his goods were attached for £37, and at the return of that writ the petition in this matter was filed on behalf of the petitioner, who was then in England, praying that he might be declared insolvent; and upon the 7th of May an order was made by the Court for the usual examination of the petitioner on the second Monday in July, and the Chief Clerk and Registrar of the Court was thereby appointed provisional trustee of his estate and effects. No further proceedings were taken in the cause of Cozens against the petitioner. It appeared by the petitioner's schedule that his debts amounted to £4588 1s 4d., and his assets to £2421 14s. 9d.,

* *Vide* Williams et al, Assignees of Rutherford v. Rogerson, ante p. 21.—EDITOR.

and Mr. Simms as such provisional trustee took possession of the petitioner's assets.

On the 18th of May an affidavit was sworn by Mr. Mare and filed in this Court, and in that affidavit several certified copies of documents in the Court of Bankruptcy at Manchester, in England, were referred to, and from these documents it appeared that on the 19th of April the petitioner was duly declared a bankrupt, that James Pott was appointed official assignee, and that he had by power of attorney authorized Mr. Mare to take possession for the purposes of such bankruptcy of all the petitioner's estate, property and effects in Newfoundland. Upon these documents an application was made in chambers on behalf of Mr. Mare, and I made an order directing Mr. Simms to hand over to Mr. Mare all the goods, monies and effects which, under the order of the 7th May, had come to his hands or under his control.

The present application was made to set aside that order on behalf of some of the Newfoundland creditors of the petitioner, upon the ground that the assignee of the Court of Bankruptcy in England had no just or legal right to this property, but that it should be distributed under the orders of this Court. That question was recently argued before the three judges, and we are all of opinion that the order made on the 19th of May was correct, and it ought not to be disturbed. The enactment contained in the Imperial statute 12-13 Vic., c. 106, s. 141, removes all doubt from our minds in a case like the present. It enacts, "That when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, &c., and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right and interest in such debts, shall become absolutely vested in the assignees for the time being for the benefit of the creditors of the bankrupt by virtue of their appointment, and after such appointment neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of London or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt."

The title thus conferred upon the assignees in the property of the bankrupt in this country and elsewhere this Court is

bound to recognize, and no doubt can exist that if there had been no insolvency matter pending in this country, but that the fund which is now in this Court in that matter consisted of debts due by parties here to the bankrupt, the assignees would have a right to the assistance of this Court to compel such parties to pay their respective debts. This being as it appears to us unquestionable, we do not think the proceedings in this Court create any difficulty.

Questions of grave importance were discussed in the argument respecting the effect of bankruptcy in England upon the rights of parties in other countries who claimed property adversely to the bankrupt and to his assignees, either as *bona fide* purchasers for valuable consideration or by reason of adjudications in their favor prior to notice of the bankruptcy in England, and in such cases the law of domicile and other questions of international law would deserve consideration; but these cases have no application to the present for this reason, that there is not in this case any party claiming his property adversely to the bankrupt and his assignees, there is no question as to whom the fund in this Court belongs, it is admitted and conceded to be the property of the bankrupt. This Court upon the petition of the bankrupt appointed an officer, in whom his property vested in order that he should collect it in for the general body of the bankrupt's creditors; for that purpose alone we hold it as part of the bankrupt's estate; we have not adjudicated in respect to it in favor of any third person; no one insists upon any right inconsistent with the fact that it still continues to be the property in the bankrupt in our care for the general body of his creditors.

This being so, we find that prior to the appointment of our officer to collect this fund, a Court of competent jurisdiction had appointed an officer whom the law declares to be the proper trustee of all the estate of the bankrupt, for the very purpose for which we collected and held this fund, and we entertain no doubt that under these circumstances it is the duty of this Court to transfer it to the trustee under the bankruptcy in England. Upon these grounds we are all of opinion that the motion to set aside the order of the 19th May must be refused.

With respect to Mr. Cozens, we are of opinion that he has not acquired any rights as against this fund prior to the rights of the general body of creditors, there being no adjudication in his suit prior to the appointment of the assignee under the bankruptcy in England.

1854, *July*. BRADY, C. J.

Criminal Law—Attempt shooting—Insanity—Inquisition as to prisoner's condition for trial.

When the prisoner had been under arrest on a charge of attempt at shooting an inquisition was held before a jury to ascertain whether he was of sufficiently sound mind to be placed upon his trial. After the examination of several medical witnesses the jury found the prisoner insane, and he was committed to gaol during Her Majesty's pleasure.

AN inquisition was held yesterday in this case, to ascertain whether the prisoner is of sound mind, so as to be in a condition to be placed upon his trial for felony. The circumstances connected with this man's having fired at Peter Carter, Esq., Senior Stipendiary Magistrate, last spring must be in the recollection of our readers. His conduct since, especially lately, giving reason to doubt his sanity, the question was yesterday submitted to a jury. The case was conducted on the part of the Crown by the Attorney General and Acting Solicitor General, and by Mr. Little on the part of the prisoner. After the examination of Dr. Kielly, gaol surgeon, St. John's, the gaoler of Harbor Grace, the Sheriff of the Northern District, and Dr. Stirling, the gaol surgeon, Harbor Grace, the Sheriff of the Central District and Dr. Stabb, physician to the Lunatic Asylum, as to his sanity, on some question being put to the prisoner by direction of the Court, he commenced a long and incoherent address, in which he referred to numerous wrongs which he imagined he had suffered at the hands of different parties during a period of many years. Dr. Kielly, who had been in court during the whole of the proceedings, was then re-examined, and expressed a decided opinion as to the prisoner's insanity. Dr. Stabb was then re-examined, and though he did not fully concur in Dr. Kielly's opinion, he expressed his conviction that he was not of sufficiently sound mind to be placed on his trial on the charge against him. The jury were then briefly charged by the Chief Justice, and after retiring for a few minutes, came into court, and found a verdict of *insanity*.

It was then ordered by the Court that the prisoner be committed to the custody of the gaoler at Signal Hill, and be detained in strict custody until Her Majesty's pleasure be known.

Attorney General and Solicitor General for crown.

Mr. P. Little for prisoner.

1855, *January*. BRADY, C. J.*Manslaughter—Sentence—Term of imprisonment.*

Where the prisoner was convicted of manslaughter in killing a fellow school boy through throwing a stone, the Court under its discretionary power, and viewing the recommendation of the jury—the character given by his teacher and the strong testimonial from his school-fellows, reduced the sentence to one month's imprisonment.

THE Chief Justice addressed the Prisoner to the following effect:—

George Foote you were indicted for the crime of manslaughter, by throwing at and striking with a stone one Wm. Feehan. To that indictment you pleaded not guilty; a jury was empannelled to try the truth of that plea, and that jury found the only verdict, which an honest and conscientious jury could arrive at, that you were guilty of the crime laid to your charge. The evidence which was laid before the court and jury presented the whole of this lamentable occurrence as vividly to us as if we had been present at it, and eye witness of the deed, and any other result than a verdict of guilty would have been an unworthy triumph over truth and justice. I need not impress upon a boy of your age, your intelligence, and let me add, of your education, what a grievous offence you have committed, against the law of God, and against the law of the land in which you live, by wantonly taking away the life of a fellow creature, a playmate of your own, and in his ordinary health just before he received from your hand the fatal blow. I will refer to the Statute, whereby the punishment is prescribed which this court is empowered to impose upon persons convicted of the crime of Manslaughter, not to indicate the punishment which we are about to impose upon you, but rather to remind all who fill this crowded court more especially the boys who form the larger portion of those present, that the law regards your crime as one of a most serious character, and subjects those who, in this respect violate the law, to most severe punishment, that it may serve as a terrible warning to all who may hear me, never to raise or throw a stone at a fellow creature, for this case too truly proves that if they do so, they may become liable to the highest punishment which the statute I am about to read imposes. The 9 Geo. 4, cap. 31, s. 9, enacts "That every person convicted of Manslaughter shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any

term not less than seven years, or to be imprisoned for any term not exceeding four years," &c. I do not desire to prolong your present painful position which I perceive you feel so bitterly, and I shall not therefore dwell upon the heavy affliction your crime has brought upon the home of the deceased William Feehan, and also upon your own home. I prefer passing hastily over all these considerations to the many mitigating circumstances which have appeared in your case, and which, we hope, justify us in extending in your behalf, in a very large degree, the discretionary power with which we are entrusted by the statute to which I have referred. Your youth; the circumstances under which the act which caused the most lamentable occurrence was committed; the conviction that no one more sincerely deplores the consequence of your act than yourself; the unanimous recommendation of the jury, who tried you; the character you received from the highly respectable gentleman who has been for some years your preceptor, Mr. Scott; and perhaps above all in a case like this, the document, or I should rather say the prayer in your behalf, presented to us by your thirty school-fellows, as creditable to them as it is convincing to us, that you, as school-fellow and playmate, had earned no unworthy reputation; but that, on the contrary, your conduct prior to this sad even has led them here to bear testimony in your regard. All these circumstances convince us that your crime was the result of one of those unpremeditated acts of human frailty to which both old and young are subject in the heat of sudden passion, and which are more excusable in the young, than in those of more experience; and with these observations, to which I would willingly add others, but that I feel unable to do so, and with an earnest hope that the sentiments expressed in the following paragraph from the memorial to which I have last referred, may continue to be, throughout their lives, impressed upon the minds of your school-fellows, and that all the other boys of St. John's may derive a similar warning from this deplorable case, that we may thereby hope to see a termination put to the practice of a vice so prevalent in this town, and one which leads to such serious consequences:

"We are all, and each of us, deeply impressed by the sad consequence resulting from Sabbath breaking and stone-throwing, and trust that it will be a warning to all and every one of us; and in hereafter reverting, as we must, to the awful occurrence which has placed our school-fellow in such a pitiable situation; we humbly, but ardently hope, we may at the same

time be enabled gratefully to remember your Lordship's clemency and consideration of our request."

In conclusion, I will only add with all truth, that the consideration of your sentence has been with all of us a subject the most painful and distressing, and that in determining upon it, we felt coerced by an imperative sense of duty.

The sentence of the Court is, that you George Foote be imprisoned in Her Majesty's Gaol at Harbour Grace for the term of one calendar month.

RUTHERFORD v. GRIEVE.

1855, *January*. HON. SIR F. BRADY, C. J.

Practice—Pleading—Trespass—Declaration—Special plea—Demurrer—Original trespass—Substantive trespass—Matters of aggravation only.

The plaintiff carried on the business of a general dealer and as such was possessed of certain premises. The trespass charged that the plaintiff broke and entered the said premises and forcibly obtained and carried away the key thereof and closed up the premises and interrupted, &c., the plaintiff in the enjoyment thereof and evicted him from said premises. The second count charged that the defendant broke, &c., certain other premises and thence ejected, &c., the plaintiff from the possession thereof and from the prosecution of his business, and continued him so ejected for a long space of time whereby, &c., &c. To this declaration the defendant pleaded (1) the general issue, and (2) a special plea that one Bruce was lawfully possessed of certain goods on said premises and entered with the leave and license of plaintiff to remove the same, and that defendant by command of the said Bruce, entered for the purposes aforesaid. To this plea the defendant demurred on the ground that the plea professed to be an answer to the whole declaration but only answered part.

Held—Sustaining the demurrer, the first count of the declaration charges a substantive trespass *de bonis asportatis* which ought to have been, and has not been answered, in a plea to the whole of the cause of action in the declaration, and that upon that ground the plea is bad.

THIS was an action of trespass. The declaration contained two counts. The first count, after stating that the plaintiff carried on the business of grocer and general dealer, and as such was possessed of certain premises consisting of, &c., wherein was the stock in trade of the plaintiff, alleged that the defendant with force and arms "broke and entered the said premises, and forcibly obtained and carried away the keys thereof, and

converted them to his own use, and closed up the same premises, and interrupted, disturbed, and injured the plaintiff and his family in the possession and enjoyment, and evicted him from said premises, &c." The second count charged that the defendant "broke and entered certain other premises and thence ejected, expelled, put out, and removed the plaintiff from the possession thereof and from the prosecution of his business as a grocer, &c., therein, and kept and continued him so ejected and expelled for a long space of time," whereby the plaintiff lost the use and benefit of the said premises. To this declaration the defendant pleaded, first, a plea of not guilty; and secondly, a special plea "that James Bruce and others were lawfully possessed of certain goods, &c., in and upon the said premises of the plaintiff, which said goods, &c., the said Bruce, by the leave and license of the plaintiff, then and there peaceably and quietly entered into the said premises in order to take and remove the said goods, &c., and that the defendant then and there by command of the said James Bruce for the purpose and with the license aforesaid, peaceably and quietly entered into the said premises, and then and there continued for the space of five minutes, doing no unnecessary damage to the plaintiff in that behalf, as he, the defendant, lawfully might for the cause aforesaid, which are the said supposed trespasses," &c. To this plea the plaintiff put in a general demurrer, upon the ground that the plea professed to be an answer to the whole declaration and only answered a part. Mr. Robinson, in support of the demurrer, insisted that as the plea only justified the breaking and entering the plaintiff's premises, omitting to notice the expulsion and the taking of the keys and other matters charged in the declaration, it was bad; while Mr. Hoyles contended that the breaking and entering constituted the *gist* of the action, which was all that it was necessary to answer, and that as all the other charges were matters of aggravation merely, it was not necessary to justify them. This position is sound law and the only question for the court is whether the several charges, besides the breaking and entering, are merely matters of aggravation to the original trespass complained of, or whether any of them constituted a substantive act of trespass. After the decision of *Taylor vs. Cole, Hy., Bt., in 555*, it would be impossible to hold the plea bad for omitting to justify the allegations as to the eviction and expulsion of the plaintiff. The declaration in that case was in these words: "That the defendants with force and arms *broke and entered* a certain house of the

plaintiff's called the King's Theatre and expelled, put out, and removed him from the occupation, possession, and enjoyment of the same, and kept and continued him so *expelled* for, &c., by means of which the plaintiff was prevented from performing Operas," &c., and a plea justifying the *breaking* and *entering* only was held sufficient, upon the ground that the expulsion should be regarded as mere matter of aggravation, which it was not necessary to justify. The grounds upon which that case was decided in the Exchequer Chamber were thus stated: "undoubtedly to enter into a house and to expel the possessor may be *distinct* acts, and they may also be connected. But when the plaintiff charges them as *parts of one trespass* as is the case in this declaration, and the defendant sets forth a justification to the principal act, the entry, it is just that the plaintiff should, either by replication or new assignment, state that he insists on the expulsion as a substantive trespass; supposing the entry should be lawful. If he does not, it is just to consider it as matter of aggravation." An expulsion may or may not amount to trespass, according to the circumstances under which it occurs, and therefore when it is charged in connection with an unlawful entry, that charge does not necessarily import a substantial trespass; but where distinct acts of trespass are alleged in the count or declaration, they must be justified. That was decided in *Stammers vs Yearlsy*, 10 Bing. 35. In that case the first count of the declaration charged the defendant with an assault and battery, and with obliging him to go along the streets to a certain building, and imprisoning him there on a false charge"; the plea stated, "that the plaintiff having assaulted him, the defendant, he gave the plaintiff in charge of a peace officer to be taken before a justice to answer the premises and be examined and dealt with according to law, whereupon the peace officer quietly laid hands on him, and he was carried before two justices for examination concerning the premises, and was necessarily imprisoned for the time," &c. This plea was held bad on the ground as stated by *Bossanguet*, "that distinct acts of trespass alleged in the first count were not answered by the plea." *Ghillips vs Howgate*, 5 B. & Ald., 220, is to the same effect. The other cases relied on by Mr. Hoyles were *Fates vs. Bayley*, 2 Wils., 331; *Dge vs. Leatherdule*, 3 Wils., 20, in which the charges not justified were manifestly matters of mere aggravation, and *Monprivatt vs Smith*, 2 Camp. 75, and *Lambert vs. Hodgson* 1 Bing., 317, in which what was not answered was mere *excess* of what was justified, which upon all the authorities,

must be relied upon by replication or new assignment; and these cases are altogether unlike a case where a distinct and substantive trespass is alleged independant of the breaking and entering the premises, and which is not justified. That is, in my judgment, the position of the case I have to decide. I am of opinion that the first count of the declaration charges a substantive trespass *de bonis asportatis* which ought to have been, and has not been, answered in a plea to the whole of the causes of action in the declaration. In *Law vs. Dixon*, 3 Com. B. 776, which was not referred to in the argument, the declaration was like the declaration in this case. It charges that the defendant broke and entered the plaintiff's apartments, ejected and expelled him, "and also removed and took a certain brass plate of the plaintiff off and from the outer door of the said dwelling house, and kept and continued the said brass plate so removed and taken as aforesaid, for a long space, &c." The defendant pleaded a plea of justification as to the taking of the key which would have been a bad plea if this charge was mere matter of aggravation, and not a substantive trespass, *Griffiths vs. Dunnett*, 7 In. & Gr. 1002; but issue was taken upon it, and in giving judgment, Wilde, C. J., said "the removal might amount to a distinct and substantive trespass, or to mere aggravation, according to circumstances. In the declaration it is complained of as a substantive trespass," and the allegation in that case cannot be distinguished from the charge of a *bonis asportatis* in this case.

Upon these grounds, I am of opinion that the objection taken to the plea in this case is a valid objection, and as it is, according to Chitty on Pleading, one that is open on a general demurrer, I must give judgment for the plaintiff.

Mr. Robinson for plaintiff.

Mr. Hoyles for defendant.

1855, January. BY THE COURT

Shipping—Salvage—Salvors, two sets of—Bona fide Salvors—Origin Salvors, rights of—Second set of Salvors taking property from original salvors—Practice—New Trial.

Where a second set of salvors take property from original salvors, to justify the taking they must establish an absolute necessity for the interference existing at the time they took the property.

The right to the property exists in the original salvors unless it appears that further assistance was necessary for the preservation of the same.

The *onus probandi* lies on the salvors who came to assist those in possession to show an adoption of their services or an incompetency in the first occupant to effect the salvage.

THIS was an action of trover and was tried before me in the Central Circuit Court by a special jury, who found a verdict for the plaintiff. It appeared in evidence, on the part of the plaintiff, that he lived at Grand Bank, Fortune Bay, and was the owner of a schooner (the *Patriot*), tonnage 28 tons; that he and his crew consisting of three men had gone to St. Peter's from Grand Bank some days before the 31st August, and that the *Patriot* was there chartered to go to Sydney, C. B., for a cargo of coals; that on Thursday morning, the 31st August, she left St. Peter's for Sydney, and that after sailing about 70 miles, on Friday morning they fell in with a ship of about 500 tons, laden with timber, deserted and water-logged; that they boarded her and put tow warps to her from their vessel, and took her in tow and made their way back towards Fortune Bay; that they so continued in possession of the vessel from Friday until the Tuesday following, and that they were then some seven or eight miles off St. Peter's on their return to Fortune Bay when the defendant came from St. Peter's in the steamer *Vesta*, took possession of the vessel, uncast the plaintiff's warps, took her in tow of the *Vesta* into St. Peter's, and delivered her, as he alleged, to the officers of the French Government.

For thus depriving him of the possession of this vessel, the plaintiff brought this action against the defendant, and claimed to recover damages commensurate with the interest which he and his crew had in that vessel as *bona fide* salvors, on the ground that he was competent with his boat and crew to have brought her safely into port, if the defendant had not interfered with him. The plaintiff having had the prior possession of the ship would be clearly entitled to recover in this action, unless the defendant could establish such circumstances as

would have justified him in depriving the plaintiff of the possession of the vessel. Two only of the grounds relied on by the defendant would, in point of law, constitute such a justification; first, that the plaintiff and his crew were not *bona fide* salvors, but merely had the possession of the vessel as wreckers and plunderers; and secondly, that even admitting that they were in possession of the vessel with an honest intention of saving her, they were not competent to do so. The defendant is a subject of France, but the questions in this case are just the same as if he were a British subject. Upon the first point the plaintiff's witnesses admitted on their cross-examination, amongst other matters, that during the four days they had the vessel in their possession they took a quantity of things out of her, in order, as they said, to save them—a patent windlass, ten iron stanchions, chains, anchors, &c., and this was strongly relied upon as establishing that the plaintiff and his crew were merely plundering all they could from the vessel, and that they had no intention to save her, nor any expectation that they could do so. Upon the other point the evidence was very contradictory. The mate of the *Patriot* stated “that when the defendant fell in with us the weather was fine, and there was nothing to prevent us taking her into Grand Bank.” Again, when towing the vessel, he stated that on some occasions they had “jib, mainsail and foresail; wind quite free; goose wing.” And also, “the day after the defendant took the ship the wind was moderate from the south,” which wind would take them into Fortune Bay. On the other hand the crew of the *Vesta* stated that “it was impossible the schooner could tow the ship; that when the *Vesta* approached her they tried to tow her, and that the schooner was incapable of altering her position ahead; that it was impossible for the schooner to do anything, the vessel was so deep.” Against this latter evidence there was, however, the undisputed fact that from the period the plaintiff took possession of the vessel she came some 60 or 70 miles towards the place they stated they intended to bring her to, and that they were then only some seven leagues from Grand Bank. The whole of this evidence bearing upon these two points I left for the consideration of the jury, and I directed them that before they could find a verdict for the plaintiff they should be satisfied that the plaintiff and his crew were in possession of the vessel, not as plunderers, but as *bona fide* salvors; and secondly, that they with the aid of the schooner were competent to save her; and upon the latter point, as a part of my charge, I read the following

passage from *Abbot on Shipping*, 556: "If one set of persons have taken possession of a vessel abandoned at sea, and endeavoring to bring it into port and save it, another set have no right to interfere with them and become participators in the salvage, unless it appears that the first would not have been able to effect the purpose without the aid of the others." I then told the jury that if they believed the plaintiff and his crew were in possession of the vessel not as honest salvors, but for the purpose of wrecking her and plundering all they could from her, so far from being entitled to any damages against the defendant, they would be guilty of a very serious offence in the eye of the law, and the act of the defendant in rescuing the property under such circumstances, so far from exposing him to an action, should be regarded as highly meritorious; and if they took that view of the present case they ought to find a verdict for the defendant. If, however, the jury should believe that the plaintiff and his crew were honest salvors, I told them that their next enquiry would be whether, upon the evidence they had heard, they believed the plaintiff with his schooner and crew was or was not competent to save the property; and if they believed he was not, that the interference of the defendant would under such circumstances have been justifiable for the interest of all parties, and they ought to find a verdict for him; but if otherwise they ought to find a verdict for the plaintiff for the amount to which he would be entitled as a salvor; and I added, that in cases of *derelicts*, which the vessel in this case was, the general rule was to allow one-half the value of the property saved, but that that rule was not obligatory upon them, and they might award any lesser amount which they should consider fair compensation.

The jury found a verdict of £400 sterling. On a subsequent day Mr. Robinson, on behalf of the defendant, obtained a rule *nisi* to set aside that verdict on the grounds "that the said verdict is *contrary* to evidence and upon the facts contained in the affidavit of the defendant." In granting that rule I made it returnable into the Court, and last term Mr. Hoyles, on behalf of the plaintiff, shewed caused against it, having filed the affidavit of the plaintiff in reply to that of the defendant. With respect to these affidavits we feel that they ought to have little influence upon our judgment in this case. The defendant's affidavit has for the most part reference to matters which could not affect the verdict, but the main grounds upon which we feel that we ought upon this occasion to give little weight

to the statements contained in either of these affidavits against the verdict of the jury is, that when they refer to the same circumstances they are quite contradictory; and while the statements in the affidavit of the defendant tend to impeach the correctness of the verdict, those contained in the plaintiff's affidavit in reply go more strongly to establish that the plaintiff should have had a verdict, and that the amount of damages demanded was moderate. The remaining ground on which we are asked to disturb this verdict is that it was *contrary* to evidence, but there is no foundation for saying that there was not evidence in this case which warranted the verdict, if the jury, as they did, believed that evidence. The questions upon which this case depended were mere questions of fact, which was the province not of the Court but of the special jury to determine. They were questions which they were more qualified to decide correctly than the Court; and we are called upon to invade the province of the jury, and to say that they have come to an erroneous conclusion upon these questions, in a case where there is not and could not be the slightest imputation upon the jury, or any ground for impeaching their verdict, save a mistaken conclusion or their part. If the Court felt that in any case injustice would be done by allowing a verdict to stand, it would interfere and prevent that injustice, but this is not such a case, and when it is considered what the defendant in this case was bound to establish in order to entitle him to a verdict, it will be found that the verdict in this case is more consistent with the evidence than if it were a verdict for the defendant. To entitle the defendant to a verdict it has been ruled that he should have established that a *necessity*, an *absolute necessity*, for his interference existed *at the time* he took the vessel from the plaintiff. It was held in the *Charlotta*, 2 Hagg. 261: "That the Court is always jealous in maintaining the rights of original salvors, unless it appear that further assistance was *necessary* for the preservation of the property"; and in *The Eugene Bourne*, 3 Hagg. 161, it was ruled that "in conflicting claims of salvage the *onus probandi* lies on the salvors who come afterwards to assist those in possession to show *most clearly* an adoption of their services, or an incompetency in the first occupant to effect the salvage; *an absolute necessity for their interference*." We are asked to declare in effect that in our judgment the evidence in this case established that absolute necessity, when the defendant interfered with the possession of the plaintiff, and that against the opinion and verdict

of a special jury, which we are clearly of opinion we would not be warranted in doing. Upon all these grounds, the rule for a new trial must be discharged.

Mr. Hoyles for plaintiff.

Mr. Robinson for defendant.

O'DWYER v. KENT.

1855, January. HON. SIR F. BRADY, C. J.

Practice—Bail—Capias ad respondendum—Bail bond form and amount of.

Where a *capias ad respondendum* issued against the plaintiff, the Sheriff took a bail bond for the amount of the debt sued for. On a rule directed to the Sheriff to bring in the body of the defendant (special bail not having been put in) it was contended, that the Sheriff in taking bail for the amount of the debt, had done all that by law he was required

Held (making the rule absolute) the bail bond taken should be for double the sum endorsed upon the writ.

In this case Mr. Hoyles, on behalf of the plaintiff, issued a rule against the Sheriff, ordering him to bring in the body of the defendant, against which Mr. Carter subsequently showed cause. On the 22nd May, 1854, a *capias ad respondendum*, marked for the sum of £12 16s. 2d., issued at the suit of the plaintiff against the defendant upon the affidavit of the plaintiff stating that the defendant was indebted to him in that amount. The indorsement upon the writ was in these words—"Bail to be taken for £12 16s. 2d. sterling." The Sheriff arrested the defendant under this writ, and afterwards admitted him to bail on the bond of two bailsmen in the sum of £12 16s. 2d., the amount of the debt only, conditioned for the appearance of the defendant in the Central Circuit Court on the first day of the then ensuing term. The condition of the bond not having been performed by putting in special bail or rendering the defendant, the rule issued ordering the Sheriff to bring in the body of the defendant

Mr. Carter in shewing cause against the rule contended that as the Sheriff was ready to pay the amount of the debt with-

out costs, the rule should be discharged upon the ground that the Sheriff was bound to discharge the defendant from custody on receiving a bond for that sum. There was only one point raised in the argument. On behalf of the Sheriff, Mr. Carter insisted that he had discharged his obligation to the plaintiff by taking a bail bond in the amount of the debt, which he was prepared to assign to the plaintiff or pay him the amount secured thereby; while the plaintiff refused to accept that assignment or payment, on the ground that the bail bond should be in such an amount as would satisfy not only the debt sworn to but also the costs of the plaintiff.

In *Tomlin's Law Dict. T. Bail*, it is stated "Bail is used in our common law for the freeing or setting at liberty of one arrested or imprisoned upon any action, either civil or criminal, on *surety* taken for his appearance at a day and place certain. The reason why it is called *bail* is because by this means the party restrained is delivered into the hands of those that bind themselves for his forthcoming, in order to a safe keeping or protection from prison; and *the end of bail* is to satisfy the condemnation *and costs* or render the defendant to prison." It is obvious that *this end* will never be accomplished by taking a bond in the amount of the debt or demand *only*, and that the just rights of creditors would be prejudiced if plaintiffs were compelled to accede to the terms contended for in this case on behalf of the Sheriff. The principal ground relied on by Mr. Carter was the memorandum upon our writ of *capias*, 'Bail to be taken for £——,' the amount of the debt or demand. This memorandum is not a direction to take a bond for the sum endorsed upon the writ, but having regard to the definition of the word "*bail*" given above, it would appear very plainly to mean that *surety* should be taken for the appearance of the defendant in such a sum "as would satisfy the condemnation and costs," if the defendant should fail to appear. But when it is considered that our rules and forms are all framed in analogy to the proceedings and practice of the law courts in England, it will be obvious that the bond in this case is insufficient, and that the course pursued in England in respect to bail is the course which in point of law should be followed in this country under our rules and forms.

Our practice respecting bail is in all other respects similar to the English practice, and there is no good ground suggested in sustainment of a distinction which would operate unjustly on the rights of creditors. Prior to the 23 Hen. 6, c. 9, Sheriffs

could not admit parties arrested to bail, but that statute enacted "that all sheriffs, etc., shall let out of prison all persons arrested or being in their custody by force of any writ, etc., upon *reasonable* sureties of sufficient persons within the counties where such persons be so let to bail or mainprize to keep their days in such places as the said writs, etc., shall require." This statute contains an express definition of the term *bail*, "a letting out of prison of all persons . . . upon *reasonable sureties* . . . to keep their days"—that is to appear at the days named in the writs. The 12 Geo. 1, c. 29, s. 2, enacts that the sum or sums specified in the affidavit of debt shall be endorsed on the back of the writ or process, and that the Sheriff or other officers to whom the process is directed *shall take bail for no more* than the sum endorsed on back of such writ." The practice which has prevailed in England under these statutes has been long settled, and is thus stated in *1 Tidds. Pi. 228*, "The bail bond is usually taken in a *penalty*, being double the amount sworn to and endorsed on the writ, notwithstanding the statute 12 Geo. 1, c. 29, which directs the Sheriff to take bail for that sum and no more; and the Sheriff's bail are liable thereon to the full extent of the debt *and costs*, not exceeding the *penalty* of the bond." If bail in these statutes meant a bond for the mere amount endorsed upon the writ, it would be oppression on the part of the Sheriff to require a bond in double that amount; but as it does not mean that, but a release from custody upon reasonable sureties for the condemnation and costs, it may be presumed that in practice it became convenient to regard as *reasonable* a bond in the common form of bonds for the security of loans, debts or money demands—that is, in double the amount the loan, debt or demand, and that thus the practice of taking the bail bond in double the amount was adopted, and was recognised and upheld by the law courts in England. By the practice in England the writ issues upon an affidavit stating the amount of the debt and it has this indorsement, "Bail by affidavit for £——," the amount sworn to in the affidavit; in this country it issues a similar affidavit with this indorsement, "Bail to be taken for £——." In England, as has been seen, the bail taken is a bond in double the amount of the debt: our rules prescribe no form of security as the bail to be taken, nor any particular amount, but they declare "that in all cases not otherwise provided for the practice of this Court shall be the same as that of Her Majesty's Court of King's Bench in England," and

therefore the practice of the law courts in England in this respect should be followed in this Court, and the bail bond should be in ordinary cases in the form used in the Court of Queen's Bench in England—that is, as it is given in *Tidds' Forms*, 90, in 'double the sum endorsed upon the writ.' Upon these grounds I must make the rule in this case absolute.

Mr. Hoyles for plaintiff.

Mr. Carter for the Sheriff.

GISBORNE v. NFLD. & LONDON TELEGRAPH CO.

1855, *January*. HON. SIR F. BRADY, C. J.

Practice—New Trial—Inadmissible evidence—Excessive damages—Inconsistent contracts set up—Rule for Jury to follow.

Where in an action by a servant for wrongful dismissal the evidence would not establish to the satisfaction of a Jury either the contract for the servant or the master, the correct rule of law is to regard the case as one in which the servant had given his services and the master had accepted them, and the former would be entitled to fair compensation for his services.

THIS was an action of assumpsit. The declaration contained one special count, in which the plaintiff charged the defendants with wrongfully dismissing him from their employment as engineer and surveyor upon the main line of telegraph in Newfoundland, and the common counts for services performed by him as such engineer and surveyor. It appeared in evidence at the trial that the plaintiff is the brother of Frederick N. Gisborne, one of the principals named in the last Act of the Legislature constituting the Telegraph Company, and the latter was examined as a witness for the plaintiff without objection, and deposed to, amongst other matters, the following effect.

That he knew Peter Cooper, the President: and Moses Taylor, Cyrus Field, Mr. Roberts and Chandler White, Directors of the Telegraph Company. That in May, 1854, he wrote a letter to the defendants, which they received but did not answer, any more than an acknowledgement of its receipt by Chandler

White. That amongst other matters it contains a proposition from me that the plaintiff should receive \$2000 salary; that there was a verbal understanding between him on behalf of plaintiff and the said Cyrus Field and Chandler White on behalf of the defendants before the departure of C. White from New York to Newfoundland, which was that the plaintiff would be engaged by the Company at the salary of \$2000 per annum; and to the ninth interrogatory he said that he wrote to the plaintiff to the effect that he would be employed by the company at the rate of \$2000 per annum; and most particularly requested him to leave all matters relating to his salary and appointment to myself; and that a fair remuneration for the services rendered by the plaintiff was such as he himself demanded, namely, \$5000 per annum. On cross examination he said, "I know the defendants received the letter because it was written in Cyrus Field's office, copied by his own clerk in the press, and handed by myself to Mr. Cyrus Field." This witness also stated that he had been engaged in 1854 as a paid surveyor on the terms of \$5000 a year salary for one year, which duty he did not perform, some misunderstanding having arisen between him and Mr. C. White; and he further stated that "the plaintiff marked portions of the Telegraph line from St. John's across the Island to Cape Ray, in advance of the men, *which duty I was to perform*" It also appeared that at the time Mr. G. wrote the letter to the plaintiff, referred to in his evidence, the latter was at Halifax, N. S.; and soon after its receipt Messrs. White arrived there in their steamer *Victoria*, on their way to this country, and they took the plaintiff on board and brought him here, in pursuance, as he alleged, of the agreement made with his brother; and the day he arrived here, or the day after, he proceeded to the line and commenced his operations upon it. He laid out and marked the line, from, I think, sixteen miles East of Piper's Hole to White Bear Bay. All parties appear to have acted under the orders of Mr. Field, the head engineer; but it did not appear that Mr. Field did any of the practical work of marking out or surveying the line—this was done by the plaintiff; and the witness, John Saunders, stated there was not one of the other officers of the company competent to perform the duties which the plaintiff discharged. The plaintiff gave a great deal of evidence to shew the laborious nature of his duties in passing through the wilderness. One witness, Michael Fitzpatrick, who with three or four other men accompanied the plaintiff in that portion of his survey which

lay between Bay of Despair and White Bear Bay, a distance he said of about seventy miles, stated that the plaintiff put up land marks and blazed the woods as he went along, that they were eleven days going this distance; that it was laborious work and that their lives were frequently endangered in wading large rivers; that they crossed twenty-eight rivers, some of which were nine hundred feet wide; that in some instances they made rafts, that they met no habitation, and that each man was obliged to carry about sixty pounds weight of bread, pork, tea and clothes; that witness's health was so injured in that service that he has never been well since; that he was brought from his bed to give his evidence, and that no consideration would induce him to undertake a similar duty. This witness also stated that Mr. Field met plaintiff at White Bear Bay, and told him he was not going to the Cape (mentioning Cape Ray), but that he wanted plaintiff to go to St. John's to test insulators, and the plaintiff then went on board the *Victoria* steamer and in company with Mr. Field returned to St. John's about the beginning of August. It was also proved that immediately after his return here he was employed by Mr. Chandler White testing insulators, and also in showing the proper mode of testing the wire for the line,

On the 6th September plaintiff wrote the following letter to Mr. C. White: "Sir,—Be good enough to send me by bearer the sum of thirty dollars for my board and lodging since the 6th of August, when I came here by your directions to test the insulators, &c. I am only awaiting your instructions as to my next employment and am of course ready to proceed thereupon at once. I am, &c., H. J. Gisborne." In reply to that letter he received the following: "St John's, Nfld., 7th Sept., 1854. H. J. Gisborne, Esq., Sir,—I am requested by C. White, Esq., to reply to your note of this date, and to inform you that he is not aware that you have been employed by him or the New York, Newfoundland and London Telegraph Company to test insulators, of which article the Company have had none in St. John's for a month; nor did you arrive here under any directions from him. M. D. Field, Esq., who employed you, states that you were hired at \$75 00 or £18 15s. per month, and that you were paid by him \$47 15c. or £11 15s. 9d., leaving a balance of £6 19s 3d due you for June, as per pay roll for that month, forwarded by Mr. Field. Mr. Field also writes on the 4th August that he has sent you discharged, having no further use for you. I herewith tender you the balance due to the

1st August, adding for the time up to your arrival here, 6th August. Yours, &c., G. J. Hogsett."

The statement in this letter, that the Company had no insulators in St. John's at the period referred to, is wholly inconsistent with the plaintiff's evidence at the trial, and even with the evidence of the principal witness for the defence, Mr. Field. The defendants rested their defence upon two grounds—first, that the plaintiff entered into their service upon an express agreement to be paid for his services at the rate of seventy-five dollars a month; and secondly, that even if there were an agreement for a year's employment, the plaintiff did his duty so inefficiently and so negligently that the defendants had a right to dismiss him. In support of the defence Matthew D. Field stated that he was Engineer of the defendant's works—that "On board the *Victoria*, coming from Halifax, on the 29th May, the day before we arrived here, I made a bargain with plaintiff to employ him on the line at seventy-five dollars per month to assist in laying out and marking the line"—that "On the first of August he was dismissed from the service of the company as far as my department was concerned—I said to plaintiff, that *I had no other use for him on the line—that when I was in St. John's there were some insulators to be tested. and that perhaps Mr. White would employ him but that was between him and Mr. White.*" This witness and a couple of others gave some evidence to shew an omission and a refusal on the part of the plaintiff to discharge his duty properly, which I left to the jury; but in my judgment it was wholly insufficient to justify the dismissal of the plaintiff. If the jury believed that he had been hired for a year, as he alleged; and it was a defence for the first time suggested at the trial, and was wholly inconsistent with the cause of his removal from the line, as stated in the evidence of Mr. Field and in the letter of Mr. Hogsett.

I left three questions to the jury, which was a special jury had at the instance of the defendants. First—were they satisfied that a final and conclusive agreement had been entered into by the company to employ the plaintiff at the annual salary of two thousand dollars? If so, the plaintiff would be entitled to recover damages for their breach of contract in dismissing him, unless the defendants established that by reason of his default or negligence or misconduct in his employment, they were justified in dismissing him. Upon that question I called the attention of the jury to the evidence of Mr. F. N. Gisborne, and intimated that in my opinion it proved a proposal on be-

half of the plaintiff, not conclusively agreed upon, but certainly entered, rather than a final agreement. I then told the jury that if they were not satisfied that the agreement upon which the plaintiff relied determined finally the terms upon which he entered into the employment of the defendants, they should then ask themselves were they satisfied that the agreement relied upon by the defendants was the true contract under which the plaintiff was employed; and if they believed it was I added that the defendants would be entitled to a verdict, because they would, under that agreement, be entitled to dismiss the plaintiff at the end of any month if, as they say, he was dismissed at the expiration of two months, for which two months, it is admitted, he has been paid at the rate of seventy-five dollars a month. Lastly—I told the jury that if the evidence did not establish to their satisfaction either the one agreement or the other, then it would be their duty to regard the case as one in which the plaintiff had given his services and the defendants had accepted of them, without having by previous arrangement determined what the one was to receive and what the other was to pay for them, and that in that case that they should ascertain what would be fair compensation for the services which the plaintiff had performed for the defendants, and if the compensation should exceed the sum of £41 5s. which he has been already paid, they ought to find a verdict for the amount over that sum; but if they believed that that sum was sufficient, to find a verdict for the defendants. The jury found a verdict for £308 15s. cy. Subsequently Mr. Hoyles on behalf of the defendants obtained a rule to set aside this verdict, and for a new trial, against which Mr. Robinson for the plaintiff afterwards shewed cause. The rule was taken upon three grounds, that F. N. Gisborne's answer to the ninth interrogatory was inadmissible—that the verdict was contrary to evidence—and that the damages were excessive. I have already stated the grounds on which I thought that the evidence objected to was admissible, and I am still of opinion that it was correct to receive it. As to the ground that the verdict is contrary to evidence in being a verdict for the plaintiff for any amount whatever, there is no foundation for such a position, for the plaintiff gave abundant evidence to entitle him to a verdict, if the jury declines to act upon the defendants' testimony.

In his argument Mr. Hoyles did not argue the proposition that the verdict was contrary to evidence but he broadly contended that the verdict ought to be set aside because the jury

did not act upon the evidence of the witness for the defendant, Mr. Field.

I cannot concur in that view, and upon more serious consideration I am sure that Mr. Hoyles will feel that that argument was most untenable.

It is peculiarly the province of the jury to judge of the credit to be given to the evidence laid before them, to say to what witness they will give credit, and to whom they will not do so: what portion of the evidence where it is conflicting they will act upon, and what portion they will discard.

This is particularly the case when there is, as in this case, a conflict of testimony, for the evidence of Gisborne is wholly inconsistent with that of Field, and it is hardly possible to come to the conclusion that both statements are true. That the proposition of Mr. Gisborne on the behalf of his brother was made to the company was not and could not be questioned, the only doubt that existed was whether it had been finally acceded to; and that being the case, when a witness deposes to a contract so inconsistent with the terms upon which the plaintiff's services were proposed to the company, and that proposal most certainly entertained by them, surely a jury may fairly say we will not act upon a representation which is all but repugnant to what we know to be true, unless it be made as clear as day to our minds. Can it be pretended that anything of that kind was done in this case? The contract relied upon by the defendants, and which is so wholly irreconcilable with the treaty which a few days before had been unquestionably pending as to the terms on which the plaintiff was to be employed, is stated to have been made after the plaintiff had been taken on board the defendants' steamer at Halifax, and taken for no purpose but as an employee on their telegraph line; it is made in a loose conversation on board the steamer the day before they arrived here from Halifax, between Mr. Field and the plaintiff, the latter being almost a stranger to Mr. Field, for the latter states in his evidence that he never saw him until they met a day or two before at Halifax; there is no third party present at the conversation deposed; there is no writing to record the terms of this alleged contract and agreement, although it appears to have been the usual course with the defendants to have written contracts with all their officers and servants. This agreement substitutes a contract at seventy-five dollars a month, that is at the rate of twelve shillings and sixpence a day, by the month, for services tendered to the company in a formal

way, and to say the least that proposal entertained by leading directors of that company at £500 a year; and it is not most difficult to reconcile the statement of Mr. Field that when he proposed seventy-five dollars a month, as he states, for the plaintiff's services, that the latter should have made no allusion whatever to the communication he had received from his brother previously, that he was to have from the company £500 a year, nor is it easy to believe that the engineer and surveyor agreed to perform these services at the rate of twelve shillings and six pence a day, when the labouring men on the line refused to accompany him at the rate of one pound a day, which he offered at Bay Despair to such five or six men as would join him. It would be sufficient for me to observe that upon all those matters to which I have adverted it was the peculiar province of the jury to determine, and I am asked to say that in my judgment, those twelve gentlemen have discharged their duty erroneously in not acting upon the testimony of Mr. Field a course which, under the circumstances to which I have referred, would be an unwarrantable interference with the province of the jury.

With respect to the damages being excessive, the jury having negatived the existence of the agreement set up by the defendants, it is impossible for me to say that the verdict is unjust upon that ground, because it is consistent with the agreement relied upon by the plaintiffs and it is consistent with the payment for the like service, the previous year, the plaintiff's brother having been then employed at £500 a year, and with such sum agreed to be paid to him for this service in 1854, and also with the fact that as Mr. Feild the head engineer received £1000, the plaintiff the next sub-engineer, and who appears to have performed the practical and laborious duty, would receive substantial remuneration for his services.

It was, however, also said that this was a verdict dictated by prejudice and passion, and that the Court ought therefore to set it aside. If that position were established I quite admit that no verdict had under such circumstances ought to be allowed to stand. If, however, in this case, I acted upon that ground and declared that, the jury, forgetful of the obligation of the oaths they had taken, had permitted their minds to be led away by prejudice or passion and under their influence had done such palpable injustice to the defendants that the extraordinary interposition of the Court should be exercised to protect the defendants from that injustice, I would ask where

would I find in this case grounds for my uttering such imputations? There where none disclosed in the trial before me, and therefore upon all these grounds I am of opinion that I ought not to disturb the verdict had in this case, and that the rule for that purpose must be discharged.

Mr. Robinson, Q. C., for plaintiff.

Mr. Hoyles, Q. C., for defendant.

DES BARRES v. MORRIS.

1856, *January*. HON. SIR F. BRADY, C. J.

*Public officers—Bond—Crown lien of on estate for such bond—Statutes English—
How far in force in Newfoundland—38 Hen. 6, cap. 39, and
13 Eliz., cap. 4—Mortgage of real estate, priority of*

The statutes 38 Hen. 3, and 13 Eliz., cap. 4, which gave the Crown a lien upon the real estate of certain public officers as a security for the fulfilment of their bonds are not in force in Newfoundland.

THE bill in this cause was filed to foreclose a mortgage which the plaintiff had upon the landed property of the late Patrick Morris. It appeared that in the year 1841, Mr. Morris, being at that time the owner of valuable landed property with buildings thereon in St. John's and its neighbourhood, was appointed Treasurer of this colony by letters patent under the great seal of this Island, and upon the 20th August in that year he, as such Treasurer, executed a bond to Her Majesty, her heirs, &c., in the sum of £8,000, with a condition to account, &c., from time to time to the governor for all monies received by him in the said office of Treasurer. Upon the 22nd December, 1841, he, by indenture, in consideration of £1200 stg., mortgaged "all those messuages, dwelling houses, &c., as in said indenture described, to the plaintiff, Judge DesBarres, and in the month of August, 1849, the said Patrick Morris departed this life, having previously made his will, and thereby appointed his widow, one of the defendants, executrix. Shortly after his death the Attorney General issued an extent under which he obtained pos-

session or the receipt of the rents and profits, of all Mr. Morris' property, including the property mortgaged to the plaintiff, upon an allegation that Mr. Morris was an accountant to the Crown, a defaulter to the amount of £6000 or thereabouts, at the time of his decease. The case came before me for hearing on pleadings and proofs, and several questions were raised and argued, but upon one only of these questions I feel it necessary at present to express an opinion: that question has reference to the claim of the Crown to rank as an incumbrancer upon the lauded property of the late Mr. Morris, in priority to the plaintiff's mortgage; and the validity of that claim depends upon this question, whether, when the plaintiff obtained his mortgage security upon the property of Mr. Morris, as was insisted upon on behalf of the Crown, the Imperial statutes, the 33 Hen. 8, c. 39, and 13 Eliz., c. 4, had the force and operation of law in this colony, and secondly, if that were so, whether the present case falls within the provisions of one or other of these statutes. As to the second question it appears to me that, if these statutes, or either of them were in force in this colony, there is no officer in the island who would come so clearly within the language and object of these enactments, particularly of the statute of Eliz., as the Treasurer of the public monies of the colony; and I shall therefore confine my judgment to the first question, viz.: have these statutes, or either of them, the force and operation of law in this colony? This question, under circumstances precisely similar, came before the Court of Chancery in Nova Scotia in 1848, in the case of *Uniacke v. Dickson*, and the Chancellor, having called to his assistance Chief Justice Halliburton and Mr. Justice Hill, in accordance with their opinions, decided that these statutes were not in operation in that province, and that the claim of the Crown, the same as is preferred in the present case, was in that case disallowed. From the able opinions given by these experienced and distinguished judges in that case, I have derived great assistance, and as those who represent the Crown in that province have acquiesced in the decision founded upon these opinions, it would perhaps be sufficient for me to state that in my judgment the grounds upon which the judges in Nova Scotia sustained their opinions, apply with far greater force to the circumstances of this country than to those of that province; but as the decision in Nova Scotia is directly opposed to a decision of the Supreme Court of New Brunswick, I have deemed it right to state at greater length the grounds upon which I rest my judgment in this case. It has not been, and

could not be contended, that the language of either of these statutes could operate to extend them to this colony, or to any of the foreign possessions of the Crown of England, or that when enacted, they were intended to extend beyond the realm of England; and as a fact, shewing their limited operation, the liberties, &c, of the Duchy of Lancaster and county Palatine of Lancaster are excepted from the operation of these statutes. The principal ground relied upon by the Attorney General was that these statutes constitute a portion of the law of England which the subjects of the Crown who settle in new and uninhabited countries carry with them for their protection and government. All commentators upon this branch of the law give a vague and general statement as to the laws of the mother country which colonists so carry with them—amongst those the following rule laid down in *Blackstone*, has been very generally followed in reference to the colonies occupied by English subjects, as this colony, Nova Scotia, and others, have been. After stating the law as laid down in *Blankard v. Galdy, Salk., 411.*, that “it hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws *then* in being, which are the birthright of every subject, are immediately then in force,”—he adds, “but this must be understood with very many and very great restrictions. Such colonists carry with them only so much of English law as is applicable to their own situation and the condition of an infant colony: such, for instance, as the general rules of inheritance and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great commercial people, the laws of police and revenue, (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted, and what rejected, at what times and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the King in Council.” The difficulty of determining in each particular case what laws are in force, and what are not, is stated in *Howard's Laws of the British Colonies, XII.*, in these words: “Thus then it is clear that the English laws are partially in force in many of our American possessions; but it is equally clear that for want of certain admitted principles, upon which the applicability of those laws can be established, it is

very difficult to define which of them do, and which of them do not extend to the colonies respectively; and that, on the contrary, the greatest difference of opinion exists on the subject both at home and in the colonies." The rule is well laid down by one of the learned judges in *Uniacks vs. Dickson* in these terms: "The *general* rule on this subject appears to be that wherever English subjects discover and possess themselves of an uninhabited country they carry with them such of the English laws then in force as are applicable and necessary to their situation and the condition of the infant colony; as for instance, laws for the protection of their persons and property." In that case the judges ask themselves whether, when Nova Scotia was first settled and possessed by English subjects, these statutes of *Henry* and *Elizabeth* were applicable and necessary to the condition and state of the first occupiers and possessors of that colony? Did the state of the colony require them to be in force? And they were of opinion that these statutes were not necessary to the state and condition of Nova Scotia or to its wants or requirements; and upon that ground they decided that they were not in force in that colony. Applying the same questions to the early history of this colony, so different from that of Nova Scotia, can it be for a moment contended that if the laws in question were unnecessary and inapplicable to the latter they were not so also to this colony? The settlement of Nova Scotia dates from its first occupation by English subjects, a period of more than two hundred years; but, although this country has been resorted to and occupied by English subjects as a fishing station from a very early period of our colonial history, yet until within a comparatively recent period its permanent settlement and colonization by English subjects and others was discouraged and prevented by statutes of the Imperial Parliament, and it was not until towards the close of the last century that the law recognised a right in any occupant or inhabitant to any portion of the soil in Newfoundland, and that recognition only extended to rights in fishing-rooms, the policy of the English government being even at that period to regard and treat this country as a mere fishing station, and to discourage any permanent settlement upon or cultivation of the land. It could not be contended that those who resorted to this country, during all the period to which I have just referred, carried with them the common law or statute law of England. The powers of government were exercised by the officers of the English vessels of war

upon the station; the population were under the control of fishing admirals, as they were called, of surrogates and other similar officials, and tribunals; but they were denied that protection and those rights, liberties and privileges which in other colonies were admitted to be the birthright of those subjects of the Crown who resorted to and occupied them. While settlement was forbidden, and the acquisition of any property in the soil was prohibited, there was no landed property in the colony upon which the lien or charge created by these statutes could attach; while there was no revenue to be collected under local authority, there were no local officers to be appointed or to give bonds to the Crown; and under such circumstances how could it be said that these statutes were applicable or necessary to the condition of Newfoundland or to the wants and requirements of its inhabitants throughout that period? Another consideration of great importance to prove the inapplicability of these statutes to this country, at least prior to the year 1825, is, that until the establishment of the Supreme Court in that year, there did not exist in the colony any tribunal or jurisdiction to issue an extent or to enforce the provisions of these statutes. It was not until 1832 that a representative institution was conceded to the colony, and a power was thereby given for the first time to the local government to impose taxes, to create a revenue, and to appoint officers to collect and secure it. Prior to this period any revenue that was collected was imposed by Imperial statutes, and was collected, cared and managed under Imperial authority, and the parties concerned therein were subject and liable to account in England, and were not subject to any jurisdiction in this country; and, therefore, the operation of these statutes as law in this country, up to this period, would be not only inapplicable but wholly unnecessary. Amongst other enactments on this subject, the *54 Geo. 3, c. 184, s. 1*, (made perpetual by the *1 Geo. 4, c. 121*), enacts "That it shall be lawful for His Majesty to appoint three commissioners for examining the public accounts of all Governors, Lieutenant Governors, and other public officers and servants, and of all other persons whatever who have been or shall be concerned in the receipt or expenditure of the colonial revenues of England, &c., or of any other colonies or dominions subject to the crown of Great Britain"; and the statute then proceeds to render all such persons subject and liable in the Court of *Exchequer* in *England* for all sums due on such accounts, as all other public accountants, in England. This

statute would not, I apprehend, apply to any colonies after the Imperial Government had surrendered to them the colonial revenues; but until then, that is as respects this country until 1832 or 1833, it would seem to indicate very plainly the proper tribunal in which the receivers, &c., of the colonial revenues should account, and to which they would be responsible, and it would render the operation of those statutes of *Henry* and *Elizabeth* prior to that period wholly unnecessary and inapplicable to the condition, the wants and the requirements of this colony. By the Imperial statute, *2, 3 Will. 4. c. 78*, (1st August, 1832), the revenues of this colony were surrendered by the Imperial government to the local government of the colony, subject to one condition, and thenceforth they came under the management of the local government. It could not be contended that this circumstance operated to introduce, for the first time, as law, these two statutes into this colony after it had been in the possession and occupation of English subjects for the purposes of trade and fishery, and more recently of settlement, since, at least, the middle of the 16th century. On the contrary, so far from recognizing the operation in this country of the statutes of *Henry* and *Elizabeth* as affording the means of protecting the revenue, an Act (3 Vic., c. 3), (12th Oct., 1831), was passed by the local legislature, and is entitled "An Act for the safe keeping and due collection of the Colonial Revenue of Customs," and it enacts "That the Collector of Her Majesty's Customs, and all other persons employed under him into whose hands any monies granted unto Her Majesty, &c., shall enter into and they are hereby required to give *such securities* for the due collection and safe keeping of all such monies as the Governor or person administering the government for the time being shall, with the advice of Her Majesty's Council, deem reasonable." This is the only provision of the local legislature upon this subject which has come under my notice, and in connection with it I may refer to a local Act upon which the counsel for the plaintiff relied, as, in itself, an answer to the claim of the Crown in this case, which, if it does not amount to that, is an enactment well deserving consideration in reference to the provisions to which I have just referred. The Act is the *4 Will. 4, 2nd sess., c. 18*, (12th June, 1854), and is entitled "An Act for declaring all landed property in Newfoundland real chattels," and it was, upon unquestionable grounds, contended that if all landed property in this colony was to be regarded by the courts as chattels real

the claim of the Crown could not affect the rights of the plaintiff, because, as against chattels real the rights of the Crown, even in England, would only affect this property from the award of execution.—*Co. 8, 171.* The words of that Act are "That all lands, tenements and other hereditaments in Newfoundland and its dependencies, which by the common law are regarded as real estate, *shall in all courts of justice* in this island be held to be chattels real, and shall go to the executor, &c., any law, usage or custom to the contrary notwithstanding." This enactment was in operation some years prior to the appointment of Mr. Morris as Treasurer, and to the date of his bond, and the strongest objection which the Attorney General could urge against the argument founded upon it was, that as the sovereign was not named the rights of the Crown were not bound by it. It was, however, insisted, upon two grounds, that this Act could not affect the rights of the Crown: *First—because a law, which declares that all land in this colony is to be regarded in all courts of justice in the colony as chattels real, is so repugnant to the laws of the mother country as to be thereby void*; and secondly—if that position were untenable, that as the Act does not name the sovereign it is not binding upon the Crown. Assuming the first proposition to be untenable, if I assented to the latter proposition it would lead to this consequence, that a law, the validity of which could not be questioned, and under which all landed property in the colony is, so far as the rights of the owners and occupiers are concerned, to be regarded in the courts of justice, where the sovereign is always supposed to be present, as subject to the rules which regulate the disposition of and the rights to chattels real, save and except as relates to the sovereign, in respect to whom the same lands should be subject to the very different rules which regulate the disposition of and the rights to freehold property in the mother country.

Without expressing any positive opinion on that question, which I feel to be quite unnecessary in this case, it is sufficient to say that the Legislature, when it directed in 1839, that the security for the safe keeping, &c., of the public funds should be such as the Governor, &c., should deem *reasonable*, could hardly mean or intend a security from the persons appointed, upon the freehold property, the existence of which in Newfoundland had been negatived, or, if it ever existed, had been abolished by the enactment to which I have just referred. It was also strongly urged by the Attorney General that these statutes of *Henry*

and *Elizabeth* were imported into this and the other colonies by the express provisions of the Imperial Act 5 Geo. 2, c. 7; but in my judgment that enactment affords stronger arguments against than in favor of the Crown. It appears from *Stokes in the Colonies*, 371, that this Act originated in a petition which "several merchants in England preferred to Parliament, and complained that in Virginia and *Jamaica* a privilege was claimed to exempt their lands and tenements, and their negroes also from being extended for debt." It is entitled "An Act for the more easy recovery of debts in His Majesty's Plantations and Colonies in America," and the 4th section enacts "That the houses, lands, negroes, and other hereditaments, and *real estates* situate or being within *any of the said* Plantations belonging to *any person* indebted, shall be liable and chargeable with all just debts, duties, &c., &c., owing by any such person to His Majesty, or any of his subjects, and shall, and may be assets for the satisfaction thereof, in like manner, as real estates are by the law of England, liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process, in any court of law, &c., for serving, extending, selling, or disposing of any such houses, lands, negroes, or other hereditaments and real estates, towards the satisfaction of such debts, &c., and in like manner as *personal estates* in any of the said Plantations respectively, are seized, extended, sold or disposed of, for the satisfaction of debts." The Sovereign is named in this enactment, and the rights of the Crown are therefore bound by it, and the manifest effect of the language used, is that the landed property and negroes of those in the American colonies, who were debtors "to His Majesty or any of his subjects," should be assets for the satisfaction of their debts "in like manner as *personal estates* in any of the said Plantations respectively are seized, &c., for the satisfaction of debts; thereby giving all such creditors the same rights against the real estates as they previously had against the personal estate of their debtors. This construction is strongly confirmed by a decision in the Privy Council, *Turner vs Cox*, 8 Moore, 288, where it was held—"That the Statute 5, Geo. 2, c. 7, made real estates in the *West Indies* legal assets in such a way as to give the same priority to specialty creditors against real estate, as they previously had against *personal estate*." Assuming that to be the true construction of this statute, the rights of the Crown against the real estate of Mr. Morris would only attach from the accrual of the debt, or the award of execution and it could

not affect in any way the priority of the plaintiff in this case. The law, as it exists in *Jamaica*, as to the rights of the Crown, seems to me conclusive upon this part of this case. The 5 Geo. 2, c. 7, was made with express reference to *Jamaica*, and it recognises in that island the existence of *real estates*; but the Crown has no lien upon the property of its accountants, and the only priority it has above the subject is that the execution of the Crown is preferred to that of the subject. In *Clarke on Colonial Law*, 343, the author, writing on *Jamaica*, states that "The common law of England prevails as far as local circumstances permit, and when it is not at variance with Colonial Acts"; and in 3 *Burge's Col. Law*, 320, the law upon this subject, as it prevails in *Jamaica*, is thus stated:—"In *Jamaica* and the other West India Colonies, which do not adopt the laws of Holland, Spain, or France, the Crown has *no lien* on the property of its accountants for any debt due by them as such accountants. In *Jamaica*, the writ lodged by the crown on a judgment which it had obtained is, in the distribution of the proceeds of a levy, satisfied before writs lodged on judgments at the suit of a subject of a prior date. *The same preference exists in other colonies.*" From what I have just stated, it is clear that in *Jamaica* and other colonies where the common law of England has been generally adopted, where freehold property or real estate was recognised, and the rules of inheritance in the law of England prevailed, and for which the 5 Geo. 2, c. 7, was *expressly* enacted, the right which the Crown claims in this case does not exist, nor does it appear that it was ever preferred. I can, with truth, say that many matters, to which it would be too tedious to refer, came under my notice calculated to strengthen the conclusion at which I have arrived, but I will briefly refer to one argument which had great weight with me when first stated, viz.: that this claim of the Crown rested upon its forming part of the prerogative and as such it extended to every portion of the Queen's dominions. That position is quite true of those ancient prerogatives which are inherent in the person of the Sovereign, and prevail in every part of the dominions of the Crown; but it is plain that the one in question in this cause is not one of the former, because there are many parts of Her Majesty's dominions, in which, as we have already seen, it does not prevail, and, I find, that it formed the subject of special legislation at the period of the Unions between England and Scotland and between Great Britain and Ireland. In the legislation upon this subject, in

relation to the former Union, the prerogative or privilege claimed in this case was not conceded to the Crown, and in order to enforce the limited priority, recognised in the Crown in that legislation, it became necessary to provide for and create a Court of Exchequer in Scotland analogous to the Court of Exchequer in England. I have not seen any report of the case decided in *New Brunswick*; and I know nothing of it beyond what I found in the notice taken of it in *Uniacke v. Dickson*; but that is the only case cited in which these statutes were held to be force in any of the colonies, and after a diligent search I have not been able to find a decided case, or the expression of opinion in any writer upon colonial law in the affirmative, while the authority of *Burge* is against the existence of the right which the Crown has preferred in this case. Upon all these grounds therefore, I am of opinion that I ought to disallow the claim of the Crown, and decree that the plaintiff is entitled, as against the property mortgaged to him, in priority to the debt due to the Crown, and with that direction I shall make the usual decree, for an account and foreclosure.

The Attorney General for the crown.

IN RE WILL OF JOHN BROCKLEBANK.

1856, *January*. SIR F. BRADY, C. J.

Will—Testamentary capacity—Sound and disposing mind, memory and understanding, what is?—Onus of proof on whom lies.

On a proceeding to impeach and set aside a will, the ground relied upon was not evidence to establish that mental incapacity or aberration of the intellect, commonly described as insanity, but a condition of mind caused by habitual intemperance for some years before the execution of the will, which incapacitated the testator from performing that act; and, as that was shown to be the ordinary condition of the testator, the onus of establishing mental capacity at the time of the execution of the will was thrown upon the party supporting the will.

Held—A party assuming to prove insanity in order to set aside a will is required to do so by clear and satisfactory proofs. The burden of proof rests upon the party who attempts to invalidate what purports to be a legal act.

THIS proceeding was instituted by Mrs. Annie Brocklebank, the widow of the deceased, John Brocklebank, to impeach and set aside the will of her late husband mainly upon the ground

that at the time he executed it he was not of sound and disposing mind, memory and understanding. The deceased was the senior partner in the mercantile firm of Brocklebank and Anthony, and was married several years prior to 1852, to Mrs. Brocklebank, but differences arose between Mr. and Mrs. Brocklebank, caused by the intemperate habits of Mr. Brocklebank, and these differences resulted in Mrs. Brocklebank leaving her husband's house, and living separate and apart from him with her parents, both before and after the execution of the will. In January, 1852, Mr. Brocklebank was about to proceed to Europe, and upon the 30th of that month Mr. Walbank, the barrister, received a message to wait upon Mr. Brocklebank, and having done so, Mr. Brocklebank then expressed his desire that Mr. Walbank would, as his solicitor, draw up his will, for which purpose he gave his instructions, which Mr. Walbank took down at the time, and then left the deceased. On the following morning Mr. Walbank brought the formal will to Mr. Brocklebank, read it over with him, and Mr. Brocklebank then executed it in the presence of Messrs. Walbank and David Steele. The following is a copy of the will:—

“This is the last will and testament of me, John Brocklebank, of St. John's, in the island of Newfoundland, merchant. I hereby revoke all former wills and codicils by me made and appoint Kenneth McLea and Patrick Tasker, of St. John's, merchants, to be the executors of this, my last will. In the first place, I give and bequeath all and singular the household furniture, linen, china, books, pictures, and wines, which I may be possessed of at the time of my decease, unto my said executors upon trust that they or the survivor of them do and shall with all convenient speed, after my decease, sell and dispose of the same by public auction or private sale, as to him or them shall seem best, unto any person or persons for the best price that can be gotten for the same; and out of the proceeds thereof in the first place to pay the following legacies, that is to say, the Newfoundland School Society, the sum of fifty pounds; to my honest and faithful servant, John Toomey, the sum of fifty pounds; to my housemaid, Catherine Mahony, the sum of thirty pounds; to my cook, Ellen Barron, the sum of ten pounds; and to my solicitor, Matthew William Walbank the sum of twenty pounds. And after paying the aforesaid legacies upon trust, to pay all the rest and residue of the monies arising out of such sale or sales to my sister, Mrs Mary Gordon, wife of James

Gordon, Esq., of Dumfries, Scotland, writer and banker, for her sole and separate use, independent of her present or any future husband, and not subject to his control, debts, or liabilities. All my old family plate which I received upon the death of my father I give and bequeath unto the eldest son (surviving) of my said sister, Mary Gordon, hereby particularly requesting him not to sell, dispose, or part with the same, but to retain it in the family.

I give and bequeath all other plate of which I am possessed unto William Leight Anthony, Esq., of St. John's, merchant, and also my dog "Blaze," hoping that he will take good care of him so long as he shall live.

Whereas under and by virtue of certain articles of co-partnership for carrying on the business of merchants entered into on or about the 20th day of January, instant, between me and the aforesaid William Leight Anthony, it was agreed that all the capital by me invested in said trade should continue therein for the term of five years at interest at five per cent. per annum. Now I do hereby direct and appoint, and it is my will and desire that at the expiration of the said term of five years, all my capital so invested, as aforesaid, and all interest which shall have accrued thereon and all the profits which shall accrue to me or become payable under the said agreement and all the rest residue of my monies, securities for monies, funds, personal estate and effects whatsoever and wheresoever not herein otherwise given and disposed of shall be equally divided amongst the said children of my said sister Mary Gordon, share and share alike, and in the event of the pre-decease of any of the said children leaving lawful issue, then the share or proportion of him or her or them so dying and leaving issue shall belong, to his, her, or their child and children and not survive to or amongst the rest of the said children as hereinbefore expressed; the share or shares to be paid to son or sons upon his or their attaining the age of twenty-one years, and the share or shares of such one or more of them as shall be a daughter shall be paid to her or them at her or their age or respective ages of twenty-one years or day or days of marriage which shall first happen, provided always and it is my will and desire that upon the expiration of my co-partnership agreement with the said William Leight Anthony and upon a final settlement and adjustment of of all transactions connected therewith, if there shall be a net profit due to me of three thousand pounds and upwards as my share or proportion thereof over and above the

sum or sums which will be due to me for the capital which I have invested or which hereafter I may invest in the said trade, and of all interest arising thereupon, and after striking off all bad and doubtful debts and paying all legal demands upon the said business, that then and in such case I give and bequeath unto my said partner William Leight Anthony the sum of two thousand pounds to be paid out of such profits arising from such trade.

In witness whereof I have hereto set my hand and seal at St. John's aforesaid, this 21st day of January, A.D. 1852.

(Signed), JOHN BROCKLEBANK.

Signed, sealed, published, and declared
by the said John Brocklebank, as
and for his last will and testament,
in the presence of us,

(Signed), DAVID STEELE.

(Signed), W. WALBANK.

Nothing appears upon the face of this document that denotes mental incapacity, and if it contained a bequest in favor of Mrs. Brocklebank, there would not be any ground for holding the other dispositions in any respect unnatural or irrational, giving the bulk of his property to the children of a favourite sister, where it appeared that he had no children of his own. Is then the mere omission of Mrs. Brocklebank's name to be taken as proof of insanity, or is it not rather to be explained and accounted for by the unhappy terms upon which they lived? After the will was executed the deceased placed it in the hands of Mr. Walbank, and directed him to forward a copy of it to his address in London, and he embarked the same day on board the *Sir Robert Campbell* for Scotland. It also appeared that he received the copy of the will in London, and shewed it to persons at home, and the copy he so received was given in evidence in this cause. In the autumn of 1852 the deceased returned to this country, and upon the 14th December in that year he died. Mr. Walbank then produced the original will, and the copy which he had transmitted to London was found in the desk of the deceased. All the circumstances in the foregoing statement are undisputed in the cause; but the case relied on to defeat the will is that the deceased, at the time he made this will, was not of that sound and disposing mind, memory and understanding, which the law re-

quires to give validity to a testamentary document. The ground upon which this case was sought to be sustained was not by evidence to establish that mental incapacity or aberration of the intellect, commonly known as insanity, but a condition of mind caused by habitual intemperance for some years before he executed his will which incapacitated him from doing that act; and it was further insisted that as that was shown to be his ordinary condition the onus of proving mental capacity at the time of the execution of the will was thrown upon the party supporting the will. In Roger's Ecclesiastical Law, 900, the law is thus stated: "Every person is presumed to be sane until it has been shewn that he is insane; and a party assuming to prove insanity, in order to set aside a will, is required to do so by clear and satisfactory proofs, for it is a general principle of law that the burthen of proof rests upon the party who attempts to invalidate what purports to be a legal act," referring to 2 Hagg., 454, 1 Hagg., 113, 3 Hagg., 542, 517, 598. The evidence which is mainly relied upon in this case to establish that habitual mental incapacity in the deceased which would cast upon the party supporting the will the onus of proving capacity at the time he executed it, is that for two or three years, from constant habitual intemperance, the mind of the deceased was usually either so excited by excessive indulgence in spirituous liquors, or so prostrate, weak, and imbecile, as to render him ordinarily incompetent to do an act requiring a sound mind and memory. On this part of the case Charles Simms, Esq., the uncle of Mrs. Brocklebank, is the principal witness as to the mental state and condition of the deceased while in this country. As matters of fact this witness stated, "I have never seen him otherwise than under the influence of liquor for several years previous to his death, except when he was in delirium tremens;" when he dined with him "he was always under the influence of liquor either before or at dinner. I never knew him to keep sober throughout the evening within two or three years of his death when dining, or when I saw him in the evening not dining. He was several times ill and was attacked with delirium tremens three times within the last two years of his life or thereabout. Frequently saw him when he spoke incoherently, and in latter years always in lengthened interviews, in short interviews I may have found his language coherent. His intemperance was habitual and constant, not occasional, unless when the liquor was kept from him when he was under delirium tremens. In his latter years

he adopted a habit of cursing and swearing, and that he could not read printing or writing for any length of time from the general irritability of his mind and the state of his nervous system. In addition he stated it as his opinion that the deceased was not capable of transacting his ordinary business in the latter years of his life, his intellect and constitution had become so impaired, "that he was confident that deceased's mind was not in a sound state on the day he sailed in the *Sir R. Campbell* or the day before, and that he was not on either of them of sound and disposing mind, memory, and understanding. In my judgment, he was utterly incapable of transacting any important business when I saw him on those days." Nathaniel Thomas corroborates Mr. Simms as to the intemperate habits of the deceased for some years previous to his death. In December, 1851, he attended him every morning at his house and continued to do so until he left this country in January, 1852; he was in a state of mental agitation every morning. He is not sure that he attended the deceased the morning he executed the will, but says that if he did the deceased was drunk on that and the previous morning. 'On the last morning I was with him before he embarked he was so intoxicated that he could scarcely converse with me, and which was the case for the week prior to his going' He then mentions fits of raving and of incoherency and excitement which are consistent with the fact that deceased had at this period an attack of delirium tremens from which he was only convalescent when he made his will and left this country. The next witness was Mr. Charles Simms, jr., who stated that he was the brother of Mrs. Brocklebank, that he was twenty-four years of age and was a clerk in the office of Messrs. Brocklebank & Anthony for more than five years. He states that the deceased was generally intemperate for six or seven years, and that during the last two years of his life he rarely saw him perfectly sober; that during the latter years of his life he did not much interfere in the management of the business, but left the conduct of it to Mr. Anthony. He proves articles of agreement between the deceased and Mr. Anthony, the execution of which by the deceased he witnessed a day or two before he embarked in the *Sir Robert Campbell*, and he says that the deceased executed these articles at the request of Mr. Anthony without having read them over or heard them read over.

Dr. Carson, who attended deceased for some years prior to two and a half or three years previous to his disease, gave very

strong testimony to the effect that if he did not alter his habits the result would be death from delirium tremens, or imbecility of mind; but he says that in consequence of the slight intercourse he had with him for the last three years of his life, "I cannot speak of the state of Mr. Brocklebank's mind in his periods of temperance." The only other witness who speaks of a period anterior to the execution of the will was Anastasia Lane who acted as nurse-tender to him, on one occasion "a summer or two before he left here in the winter of 1852," and afterwards in his last illness. On these occasions he was in delirium tremens, but as she does not appear to have attended him in his illness preceding the execution of the will, her evidence is not of much importance upon the question in the cause. She states that "his wife was also in attendance on the occasions when she (the witness) was in attendance; that she was very constant in her attendance to him, and I never saw a lady kinder to her husband in sickness than she was to him. While I was with him on the two last occasions he spoke affectionately of her and her attendance to him."

This is the evidence upon which we are called upon to hold that it proves such a case of permanent mental disability to do rational acts prior to the execution of the will; that we ought to presume the deceased incapable to make a valid will unless his capacity at the time he executed the will be established; and this notwithstanding the evidence given in support of the will. To accede to that proposition we should give an effect to evidence of constant habits of intemperance far beyond any case cited in the argument of this case or any case that we have been able to find. But, assuming that the onus of proving capacity at the time of the execution of the will, I shall, as briefly as I can, notice the evidence as to Mr. Brocklebank's capacity prior to and at the period of the execution of the will. Dr. Kielley, his medical attendant, stated "I dined with him (deceased) at his house with Mr. Anthony the evening before his departure from this country in the month of January, 1852. He discoursed rationally and sensibly, and perfectly knew what was said and done, and what he said and did. He was then certainly capable of giving instructions for and making his will or doing any other serious or rational act. After dinner he stated that he expected Mr. Walbank to arrange some matters before leaving. He only took two or three glasses of wine after dinner and no spirits. Mr. Anthony and I left the house on Mr. Walbank's arrival." Mr. Walbank

stated that "he (deceased) gave me instructions to draw his will; I drew his will according to his instructions. He gave me pencil and paper to take notes of his instructions, and I took the notes home to my office and engrossed them. On the following morning, about nine or ten o'clock, I called on Mr. Brocklebank with the will engrossed. I read it to him in his bed-room, and he was at the same time reading it with me. He well knew and understood its contents; and he then duly signed, sealed and delivered the same as his last will and testament, in the presence of David Steele and myself. He was of sound and disposing mind, memory and understanding when he gave the instructions, and signed his will, and capable of making his will, according to the best of my knowledge and belief. He talked rationally and sensibly. He was not in the slightest degree under the influence of liquor when he gave me the instructions or signed the will." He then stated that the deceased desired him to keep the will and to forward a copy of it to his address in London, which he did, and that after his return in the autumn of 1852, deceased admitted to him that he had received the copy in London. John Stuart, Esq., stated that on the day of deceased's departure in the *Sir Robert Campbell* he was at his house, and left it with him for the ship, and added, "In my judgment he was in a perfectly sound state of mind, and quite capable of making his will on that day, when I saw him." . . . "He was perfectly sober during my intercourse with him. I always found him careful of his money." David Steele, Esq., the subscribing witness to the will, proved its execution, and added, "He was capable of making his will. He was not under the influence of any particular excitement except that arising from the bustle of starting. He discoursed rationally and sensibly. His memory was good, as far as I could judge. He did not appear to be under the influence of liquor that morning." Thomas Glen, Esq., stated as follows: "I was in his (deceased's) company about the time he was leaving to go home in the *Sir Robert Campbell*. When I saw him he was then perfectly capable of giving instructions for making his will, or doing any other serious business. He was in a sound state of mind on leaving." Kenneth McLea, Esq., after stating that he went home with the deceased in the *Sir Robert Campbell*, added, "On the day he embarked he was not labouring under the least aberration of mind as far as I could discover. When he came on board he appeared to be in quite a sound state of mind, and, I should think, capable of making

his will." Robert Alsop, Esq., after stating that he knew the deceased since 1838, he added, "I should say that he was capable of performing any business transaction then (that is when embarking in the *Sir Robert Campbell*) as well as he could at any other time of our acquaintance. He spoke rationally."

In addition to this mass of evidence, from the lips chiefly of brother merchants who had known Mr. Brocklebank for eight or ten years, and against whom no imputation of hostility to Mrs. Brocklebank or of favour to the legatees could be insinuated, there is much in the evidence against the will to sustain it and to corroborate the testimony of those who depose to the mental capacity of the deceased. In a case of this kind, one plain and undisputed fact bearing on the issue to be determined, one admitted act of importance by the deceased, would have and ought to have more weight in determining the question we have to decide, one way or the other, than the impressions and opinions of twenty witnesses given after litigation has arisen. The fact in this case is, and it is impossible to deny its importance, that a day or two before Mr. Brocklebank executed the will in question in this case, he executed an indenture renewing his co-partnership for five years—a document of just as much importance as his will, for it involved all the property of which he was possessed—and that document remains to this hour without an imputation against it, and, I may say, if Mr. Brocklebank had lived, would continue to this day to be his solemn act and deed, authenticated against him, if necessary, for the purposes of justice, by his own brother-in-law, Mr. Charles Simms, jr., who was the attesting witness to its execution. In his evidence, Mr. Simms, speaking in reference to the general question of the capacity of the deceased during the latter years of his life, stated "At times he was able to attend to business during that period, but generally speaking he was unable to attend to any important business, from the effects of his intoxicated habits." Richard O'Dwyer, Esq., who was also examined as a witness against the will, and who went home with the deceased in the *Sir Robert Campbell*, stated, "Apart from his desire for liquor he appeared reasonable for a man addicted to his habits. He spoke rationally, except when pressing for liquor. I should have felt justified in transacting business with him in the day time during the voyage. His intellect appeared acute in general conversation during the passage, and my impression is that where his own interest was concerned he did not want reason."

In addition to the evidence to which I have already adverted, and which relates to the condition of the deceased, prior to and at the time of the execution of his will, the parties at both sides have produced a great deal of evidence respecting the deceased, while absent from this country in the year 1852. Robert Gray, Esq., Wine merchant, London, the first cousin of Mrs. Brocklebank, Henry Simms, Esq., merchant, Hamburg; the uncle of Mrs. Brocklebank, Mr. Henry Holt, proprietor of Badley's Hotel, London; and Francis Hutchinson, Esq., Surgeon, London, were examined against the will. The evidence of the three first witnesses proves that the deceased continued to practice his excessive intemperance at home as he had done in this country; but it does not materially affect the evidence taken in this country. Mr. Gray refers to the deceased's having received at his office, a letter which he said contained a copy of his will from Newfoundland, and offered it to him to read, and also stated that—"He constantly talked to me of the unhappy state in which he was living with his wife." Dr. Hutchinson stated that he was called in to attend the deceased in an attack of *delirium tremens*, that he attended him for fourteen days, and that "for the first seven days he was not capable of managing business, but on the next seven days he was." Two statements made by the deceased were also relied on. In one he stated to Mr. Gaden, on board the *Sir Robert Campbell*, that he did not know "who to leave his property to"; and in the other he stated to his sister, Mrs. Gordon, when in Scotland, in 1852, that "he had provided for Mrs. Brocklebank in case of death." In support of the will, A. M. Adams, Esq., a Physician residing in Dumphries, aged 26 years; William Marshall, Esq., Physician, residing also in Dumphries, aged 34 years; Alexander McCrackan, formerly a practising Surgeon in Glenluce, aged 59 years; Archibald Blacklock, Surgeon, residing at Dumphries, aged 64 years; James Bendall, Wine merchant, Dumphries, aged 27 years; Thomas Jackson, formerly a merchant at Dumphries, and now residing there, aged 46 years; William Primrose, a Writer and Banker in Dumphries, aged 57 years; and Edward George Junes, Accountant and Agent, aged 47 years, were examined, and stated that they were acquainted with the deceased, some of them for a larger period, and on more intimate terms than others of them, but all concurred in stating that they met the deceased frequently during his residence at home, in 1852, and that he was at that time of sound mind, memory, and understanding. They nearly all deposed to his

speaking of the unhappy terms upon which he lived with his wife, to the great affection he exhibited towards his sister, Mrs. Gordon, and her children, and to frequent declarations of his that he had made his will, and that she and her children would have his property. Dr. Adam in the course of his evidence gives this answer amongst others:—"In the autumn of 1852, I accompanied Mr. Brocklebank to Hamburgh, by way of London, as his private friend, but not as his medical attendant. He then at Hamburgh shewed me the paper writing marked A, which he said was a copy of his will, and I read it by his request and returned it to him. He took it from a writing-desk, and put it back there after I had read it. While at Hamburgh he repeated to me that his wife and her relations had used him ill, and that was one reason why he had executed the will in order to deprive her of getting any of his property. He was then sober and of sound and disposing mind, memory and understanding; and he perfectly knew and understood what he said, and what was said to him." Thus we find that the will in this case was executed in January, 1852; that the testator lived until the 14th of December, in that year; that he had, during these eleven months, a copy of the will in his possession; that he, on some occasions, exhibited that to others, as a copy of his will; on other occasions he stated to different persons that he had left, or would leave his property to certain persons, (those who are the principal legatees in that will) and that he did not or would not leave it to another (whose name is excluded from it), thereby repeatedly recognising, re-adopting, and re-affirming that document as his last will and testament. There is nothing in the evidence in this case to assimilate it to the case of *Dew vs. Clark*; and that class of cases. The evidence in this case only proves an abatement of that natural affection which ought to subsist between husband and wife; and in *Dew vs. Clark*, Sir John Nicholl said "that no course of harsh treatment, no sudden burst of violence, no display of unkind or unnatural feeling merely, can avail in proof of her allegation, (against the will) she can only prove it by making out a case of antipathy, clearly resolving itself into "mental perversions," and clearly evincing that the deceased was insane as to her, notwithstanding his general sanity."

Upon all these grounds, we are of opinion that we ought to grant probate of the will in question in this case.

1856, *January*. HON. SIR F. BRADY, C. J.

Shipping—Salvage—Principle on which salvage is awarded.

The amount of remuneration of salvage services must depend on all the circumstances of the case. The state of the weather, the degree of damage and danger to the ship and cargo, the risk and peril incurred by the salvors, the time employed and the value of the property saved. When all these concur a large and liberal award ought to be given; when scarcely any of these ingredients appear the compensation ought to be little more than remuneration for work and labor.

THE act on petition in this case, claiming compensation for salvage services, was presented on behalf of Pierce Feehan, as master and owner of the brig *Lena*, and of her crew, consisting of nineteen persons. The circumstances under which the services in this case were rendered I shall state from the affidavits of two persons who do not appear to be in any way connected with the salvors, but who, on the contrary, were employed by her owners about the *William Tucker*. These persons are Solomon Dooley and Daniel King; and they state that on the 18th February, 1854, they, as hobblerers, in company with Morgan Kavanagh, a pilot, went on board the *William Tucker* over the ice, off the port of St. John's; that she was then in the ice about a mile to the south-east of the north head of the harbor of St. John's, with all sails set, but making no way, the wind blowing east to east-north-east and a very heavy sea running; that the said brig continued to work in until the evening of the 22nd February, when, the ice pressing her up Freshwater Bay, every exertion was made to keep her off the rocks; that finding she was still forcing towards the breakers on the north shore of that bay, the crew of the said vessel abandoned her, escaping to the shore; that the master let go both anchors and paid out the two chain cables attached thereto to the full extent (excepting fifteen fathoms) the sails all clewed up, but not furled, the said master and these deponents taking two chronometers and other articles belonging to the said master, abandoned the said brig for the safety of their lives and made their way across the ice to the shore, leaving no person on board; that about daylight the following morning the deponent (Dooley) saw the brig from Signal Hill, drifting off with the ice to the east-south-east; that she was then a mile and a-half from where she had been left on the previous evening, and that there was then no person on board; that he and eight others

attempted to go out of the narrows in a pilot-boat on the morning of the 23rd February for the purpose of affording assistance to the said brig or to another vessel (the *Zodiacus*) then in great peril in the ice off said harbor; that the sea was running so high against said boat as she left the narrows she was obliged to put back, and in doing so met Captain Lynch with the brigantine *Anne*, going out to assist the brig *Zodiacus*, and the captain took them on board the *Anne*; that in the evening of that day Captain Lynch, seeing the *Lena* coming out of the narrows, thereupon forced towards the said brig *William Tucker* and experienced great difficulty in getting towards her, and that he failed to board her, the ice and wind not favouring. The deponent (David King) also stated that on the morning of the 23rd February, he, with others, went to Freshwater Bay to try to board the said brig; that there were then about one hundred persons there who had gone from St. John's for the purpose of trying to board her, and also the *Zodiacus*, both then jammed in the ice; that the wind had changed during the previous night, and on said morning the ice had slackened from the shore and the sea was breaking heavily on the rocks, and neither deponent or any other person could get off to the vessels on that account; that he returned to St. John's and went out with Dooley in the pilot boat and was taken on board the brigantine *Anne*, and that her master, Lynch, when he saw the *Lena* coming out of the harbour, made for the *William Tucker*; that he dropped a boat from the *Anne* with deponent (King) and six other hands in her about a cable's length to leeward of the *William Tucker*; that the boat's crew then tried to drag the boat over the ice towards the *William Tucker*, but it was too loose and would not bear the men on either planks or oars; that the ice was running fast with the current to the southward and the boat and crew were carried away to the southward past the vessel, while she was dragging her anchors, but not going as fast as the running ice in which the boat was, and it was then found impossible to board her with or from the boat; that deponent afterwards saw the boat of the *Lena* with a crew from that vessel boarding the *William Tucker*, but shortly after deponent lost sight of the *William Tucker*, and in the said boat deponent and the rest of said boat's crew were blown off, and after encountering severe hardships and much peril they were only rescued from their danger between ten and eleven o'clock on that night; that the wind increased to a gale as the said night advanced, and continued to blow a gale until twelve o'clock next

day, west or north-west; and the deponent (Dooley) further stated that the brig *William Tucker* was drifting to the south-east when boarded by the crew from the brig *Lena* and that they had considerable difficulty in boarding her.

There is not a portion of the foregoing statement which is in the slightest degree questioned or impeached by the evidence at the other side. It further appeared that the *Anne* and the *Lena* were out at sea the whole of that night and returned to port on the following day, while the *William Tucker* did not reach the port of St. John's until the fifth day after, because, as some of the salvors swear, that they "were unavoidably driven off to sea in the said brig *William Tucker*," and were out from land five days and four or five nights, during which time they experienced much danger, privation and hardship, the wind blowing a gale the most of that time and her copper hanging loosely off her sides and bottom, she mistayed several times, and, being light in ballast, she was in great danger of being lost; that during the first and second of said days the said crew were occupied on board said vessel in putting on new gear and repairing other damages so as to enable them to bring the said brig safely into port; and that after boarding the brig it took them eight or ten hours to haul in the chains.

The value of the *William Tucker* is admitted to have been, when brought into port, £1,850 currency, and the question I have to decide is, what compensation the salvors ought to receive for the services they rendered to the owners in saving this property for them. On the part of the owners it was strongly contended that the *William Tucker* was in no danger when boarded by the crew of the *Lena*; that the latter brig or her crew saw no risk in boarding and navigating that vessel; that mere pilotage or towage compensation was all that these parties were entitled to; and Mr. Bond, in his affidavit on the part of the owners, states that fair wages for the vessel and crew would be about £58 15s. I do not at all concur in the view Mr. Robinson pressed so strongly in this case, that the services were in the nature of pilotage or tonnage services, and that the promovents deserved only a similar remuneration for services of that nature; for, in my judgment, these services have, in a greater or less degree, nearly all the ingredients which constitute salvage services; and that being the case, I am bound to award a much larger and more liberal scale of remuneration than the mere wages for work and labor to which Mr. Bond's evidence referred. It appears to me, looking fairly

at the undisputed evidence in this case, that it is impossible to contend that the vessel was not in very great danger at the time the salvors boarded her, when it is considered that they succeeded in doing so only at about six o'clock in the evening, after the attempt of the crew of the *Anne* had failed, and her boat and the crew in her had been blown off to sea, and when no other assistance was nearer to the vessel than from the port of St. John's, the wind at the time blowing heavily and the vessel drifting through the ice, certain to run ashore as another vessel did about the same time, or go into the open sea without a hand on board in a very brief period. Neither do I think it can be fairly said that Captain Feehan, in sending out the *Lena* and driving her through the ice, as was proved, at a time when she was uninsured, ran no risk, and that the crew who boarded the vessel from her encountered no peril, for without doubt the *Lena* would have been much safer in the harbor of Saint John's than upon that service; and, without referring to the evidence of the salvors as to the perils they encountered, as such evidence is always subject to impeachment, the evidence respecting the boat's crew from the *Anne*, their attempt to board the vessel, their failure, their being subsequently blown to sea, separated from their vessel, and only fallen in with by her at ten or eleven o'clock at night, is satisfactory evidence both of difficulty and of peril in the duty undertaken by those who boarded the *William Tucker*. Having regard to these circumstances, and also to the fact that when the *Lena* and her crew went upon their service the latter were making all their preparations for the seal fishery, and it was then within a few days of the usual period for their departure for that fishery, and in the absence of any satisfactory proof of anything on the part of the salvors to detract from the merit of their services, the case appears to me to be one in which a liberal remuneration ought to be given, and I am convinced that if this court adopted a scale of remuneration for meritorious and successful exertions, such as were rendered in this case, so meagre as the owners contended for in this case, it would go far to discourage parties in future from abandoning for a time their own pursuits and volunteering to expose themselves and their property to risk and peril for the preservation of the property of others. The true principles upon which such services are to be estimated are thus clearly laid down in the case of *The Industry, Davis, 2 Hagg. 304*: "The amount of remuneration for salvage must depend on all the circumstances of the case. The state-

of the weather, the degree of damage and danger to the ship and cargo, the risk and peril incurred by the salvors, the time employed, the value of the property; and when these are considered there is still another principle to encourage enterprise, reward exertion, and to be liberal in all that is due to the general interests of commerce and the general benefit of owners and underwriters, even though the award may fall upon an individual owner with some severity." Acting upon these principles, and recognising, as I do, the services rendered in this case as true salvage services, although unquestionably not involving that most material ingredient to any great extent, risk and peril to the salvors, I am, after a most careful consideration of this case of opinion that I ought to grant substantial compensation for the services rendered, and that I am thereby doing what is not unjust to those who were interested in property which was, in my judgment, in great jeopardy, while I shall, by encouraging similar exertions, serve the general interests of this commercial community. On these grounds I decree for the salvors the sum of £225 currency and costs.

NFLD. MARINE ASSURANCE CO. v. P. W. BARRON.

1856, *January*. HON. SIR F. BRADY, C. J.

Contract—Nudum pactum—Marine Insurance Policy—Agreement to pay premium although vessel be lost at the date of effecting the policy.

Where the defendant entered into a contract for a policy of Marine Insurance on a vessel with the stipulation, that the premium was not to be returned should it turn out that the vessel was already lost at the time of effecting the policy, it appeared that the vessel was lost at the date the policy was effected. In an action to recover the amount of the premium,

Held there was no consideration to sustain the promise or undertaking of the insured and that the case of the company fails on this ground.

THIS was an action of *assumpsit*. The declaration contained a count on a promissory note for the sum of £140 5s. 0d cy., made by the defendant in favor of the secretary of the plaintiffs, and by him indorsed to them, and also the common counts, but the only question for decision in the cause has reference to the amount of the defendant's note alone. It appeared upon the trial that the defendant was the owner of the *Nisibis*, and

that he had that vessel insured in the office of the plaintiffs for one year from the 1st February, 1854; that in December of that year, the *Nissbis* left the United States of America for this country, and was a missing vessel here at the beginning of February, 1855; that on the 1st February, 1855, Mr. Fraser, the agent of the defendant, in the absence of the latter from St. John's, applied to the plaintiffs to effect a new insurance on the *Nisibis* for one year from the 1st February 1855, which was acceded to after some negotiations, and only upon the condition that there should be no return of the premium in case the vessel had had been previously lost. It further appears that the vessel was lost about the 18th of January, 1855, and the plaintiffs paid the amount insured thereon under the policy of February, 1854, and the defendant having refused to pay the amount of the note given for the premium on the policy of 1855, on the ground that he was not liable for that sum as the vessel had been lost before the execution of the policy, this action was brought to recover it. The policy in this case is in every respect the usual form of policy, with the exception that it contains this stipulation as to the premium "without any return (of the premium) if the vessel be already lost." The law is unquestionable, that if this policy did not contain the stipulation or agreement I have just read, and that Mr Barron instead of giving a note had actually paid the premium, he would have a right to recover it back from the plaintiffs, because the vessel was lost prior to the time covered by the insurance, the risk insured against would never have been commenced, and consequently no benefit would be rendered by the underwriters to the defendant, nor would they be in any way damaged by the contract; the policy in such cases becomes a dead letter, and the parties are almost as if it had never been executed. "The premium paid by the insured and the risk which the underwriters take upon themselves are considerations each for the other; they are co-relatives whose mutual operations constitute the essence of the contract of insurance; and where the risk has not been new, whether it be owing to the fault, pleasure, or will of the insured, or to any other cause except fraud, the premium shall be returned, because a policy of insurance is a contract of indemnity. These principles will be found in every book on the law of insurance; and in *Stephenson v. Snow, & Burr.*, 1240, Lord Mansfield said, "the insurer shall not receive the price of running a risk if he runs none."

Mr. Hoyles for the plaintiffs, however, contended that this case was not within that rule, because of the express promise and undertaking of the defendant that there should be no return of the premium, while the Attorney General, for the defendant, contended that the promise in this case was not binding on the defendant, being a *nudum pactum*, that is, made without any consideration to sustain it. In order to render such a promise binding the law says, "The party making the promise must have obtained some advantage, or the party to whom it was made must have suffered some loss, or sustained some injury and inconvenience, in consequence of the one party making, and the other party accepting the promise."—*Addison on Contr.* (1847 Ed.) 17. 18. The promise and undertaking relied upon in this case is, that in the event of the vessel having been lost prior to the 1st February, the plaintiffs might retain £140 5s. of the defendant's monies which they would under the law be bound to return to him. For that promise the defendant did not obtain, nor under any possible circumstances, in which the plaintiffs could have the advantage of it, could he obtain from the plaintiffs the value of one farthing, for the vessel being lost prior to the period covered by the policy. The plaintiffs never could incur a liability to the extent of one farthing to the defendant under that policy; and for the same reason the plaintiffs have suffered no loss nor sustained any injury or inconvenience in consequence of the defendant making that promise, or of their accepting it; and therefore, there is not, under either of the branches of the rule which I have stated above, any consideration to sustain it, or render it binding upon the defendant. These principles are incontrovertible, and the cases of *Haigh vs. Brooks*, 10, Ad. & E. 339, and other cases to which Mr. Hoyles referred, and which I have read since the argument, are quite distinguishable from this case, for the decisions in all these cases proceeded upon the principle that there was a benefit real, or on good grounds supposed to be real, given to the party who made the promise, while in this case, as I have said, a benefit could not, to the most minute extent, be obtained by the defendant in consideration of the promise he made, nor could either party in any point of view imagine or suppose any benefit to him in case the event had happened upon the occurrence of which the promise or undertaking was to be performed, namely, the loss of the vessel before the time covered by the insurance, and which event had happened. In *Longridge vs. Dorrill*, 5, B. and Ac. 117. one of the cases relied upon by Mr. Hoyles, it was held

that "the giving up a suit instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum" To test this case by the principle decided in that case, we may suppose that the promise was not embodied in the policy, but that the plaintiffs having instituted proceedings on the note of the defendant, the latter gave a written undertaking to pay the amount in case they gave up those proceedings, would that promise be binding upon the defendant? Most certainly not, because in this case the law is clear that the risk never having commenced, the plaintiffs would not be entitled to the premium. "In order to render the agreement, to *forbear*, and the *forbearance* of a claim, a sufficient consideration, it is essential that such should be sustainable at law, as in equity: the consideration fails if it appear that the demand was utterly without foundation."—*Chit on Cout. 30*. This shews how widely the case relied upon differs from the present, and upon these grounds I am clearly of opinion that there was no consideration to sustain the promise or undertaking of the defendant, and that this case of the plaintiffs fails upon that ground. Mr. Hoyles endeavoured, in case the court was against him upon the ground of consideration, to support this case as a legal wager, but I am clear that that proposition is utterly untenable. This was a contract of insurance to which a *wagering* or *gambling* condition is annexed; a condition against the policy of the law of insurance, in attempting to deprive the defendant of a right to a return of the premium in a case where the law would otherwise give it to him, and of a nature discountenanced by the law and declared to be illegal and valueless in all such contracts.

The verdict had for the plaintiffs, must therefore be set aside, and a verdict be entered for the defendant.

Mr. Hoyles for plaintiffs.

The Attorney General for defendant.

1856, January. HON. SIR F. BRADY, C. J.

Practice—Pleadings—Plea of, release of Insurance Company holding joint risk—Demurrer—Plea bad in not averring release to have been by deed.

In an action of debt brought upon a policy of insurance, the defendants pleaded a release of another insurance company, carrying a joint risk, for a similar amount and of a policy in force at the time of the loss, and paid into Court half of the amount of the policy insured by them. This plea was demurred to on the ground that it was a bad plea of release and ought to have been averred to have been by deed.

Held—The plea was bad for not averring the release was under seal.

THIS was an action for debt brought upon a policy of insurance upon a vessel of the plaintiff's, and the merchandize therein valued at £2500, and the defendants, in addition to other pleas, pleaded the following plea upon which the question for decision arose: "And for a further plea in this behalf as to the first count of the said declaration (a count on the plea of insurance) the defendants say that after the making of the policy of insurance, and before the commencement of the voyage, &c., the plaintiff by a certain policy of insurance then and there made by him with "The Sun Montreal Insurance Company," caused himself to be insured in and upon the same goods and merchandize and on the same voyage in the said ship and against the like perils and to a like amount as are contained in the said policy in the said declaration mentioned, which policy so made with the "Sun Montreal Insurance Company," continued in full force and effect from the time of the making thereof *until and after the loss* of the said ship in manner as the said declaration alleged, and that after such loss for a certain consideration, to wit: the sum of £50 paid by the said "Sun Montreal Insurance Company" the plaintiff cancelled and discharged the said policy last mentioned, *and thereby then and there released* the said "Sun Montreal Insurance Company" from all liability for contribution towards the said loss. And the defendants further say that the plaintiff during the continuance of the policies was not interested in the said goods thereby insured beyond the sum of £2300, and that before the commencement of this suit the defendants paid to the plaintiff one-half of the said sum of £2300, to wit: the sum of £1150, on account of their loss aforesaid, and this they are ready to verify, &c." To this plea the plaintiff filed a demurrer; Mr. Robinson, on behalf of the plaintiff, contended upon two grounds that it was a bad plea; first, because supposing it to be a good plea of a

release to "The Sun Montreal Insurance Company" such release would afford no legal answer to plaintiff's claim, nor any discharge of the defendants' liability; and secondly, that the plea was a bad plea of release, and that it ought to have been averred to have been by deed; while Mr. Hoyles, for the defendants, contended that the plea was a good answer. After the best consideration I have been able to give to this case, I have come to the conclusion that I cannot, as the cause has come before me, dispose of the very important question involved in it, namely, how far a release of one company by the plaintiff would affect his right to recover the whole amount of his insurance from the other company, because the plea is insufficient for the purpose of raising that question. As a plea of a release, it is clearly bad, for it ought as such to aver that the release was under seal. In every precedent of such a plea that I have seen, such an averment is also made, and also *profert* of the deed, as an excuse for not producing it; and the reason of that is that in law "a cause of action arising out of a breach of a written or oral contract can only be discharged by a release under seal, or by the receipt of something in satisfaction of the wrong done."—*Willoughby vs. Backhouse*, 2, B. & C., 821; *Sells vs. Hoare*, 1 Bing. 401; *Baylis vs. Usher*, 4, mod. & p. 791. The amount of the plea in this case is that the plaintiff cancelled the policy, which does not, at least at law, amount to a release of the demand; nor would it affect the right of the plaintiff to recover as against the defendants in this action. In *Collins vs. Prosser*, 1 B. & C., 682, it was held that tearing off the seal of one obligor to a bond did not discharge the others, and upon a careful consideration of that case it will be found in many of its circumstances like the present, although in one respect it differs from it. In *Mathewson vs. Lydiate*, 5 Co. 22 b Cro. Eliz., 408, 470, 546, an authority of great importance, it was held that where the covenant is *several*, and not joint and several, if the seal of one of the covenantors is broken off it devoids the covenant only as to him, and all the authorities concur in this, that a covenant not to sue a co-debtee, or co-obligor, or co-covenantor, does not amount to a release of those bound with him, and that when sued they cannot take advantage of that covenant. For these reasons I am of opinion that the facts disclosed in the plea afford no answer at law to this action, and that I must allow the demurrer.

Mr. Robinson for plaintiff.

Mr. Hoyles for defendant.

1856, January. HON. SIR F. BRADY, C. J.

Arbitration—Setting aside award for not determining all the points submitted.

The Courts are always inclined to support the validity of an award, and will make every reasonable intendment and presumption in favor of its being a final, certain, and sufficient determination of the matters in dispute.

IN this case Mr. Robinson obtained a rule to shew cause why the award of Ewen Stabb and Francis C. K. Hepburn should not be set aside "upon the ground that it does not determine upon all the points to them submitted, and upon the fact stated in the affidavit of J. B. Wood," against which rule Mr. Carter shewed cause. It appeared that these parties occupied adjoining properties in Water street, and that certain differences existed between them as to their respective rights thereto, and particularly as to their rights to the adjacent water, and they, by mutual bonds, submitted these differences to arbitration in these terms: "Whereas differences exist between the parties above named as to the quantity or extent of water privilege in St. John's to which the said parties are respectively entitled where their waterside premises adjoin, and as to the true boundary of water line running north and south between them, all of which differences they have agreed to submit to the arbitration of Ewen Stabb, Thomas G. Morry, and Francis C. K. Hepburn, Esqrs., so as their award or the award of any two of them be made in writing," &c. Subsequently the following award was made: "We, the undersigned, Ewen Stabb and Francis C. K. Hepburn, two of the arbitrators in a case of disputed boundary and water privilege between, &c., are of opinion and hereby decide, agreeably to a bond entered into between the said parties, that the right line of division north and south between Studdy's property, occupied by the former, and the premises of the latter, is a straight line in continuation of the back of the brick wall forming the east side of the store on the eastern boundary of Studdy's property, twenty-two feet from the corner of the present waterside, and thence the said line continued one hundred and thirty-three feet to a point six feet S. W. of the present wharf-head of Clift, Wood and Co's and thirteen feet N. E. of the wharf of Baine, Johnston & Co. The expenses of the arbitration to be borne equally by each party." This award was signed by Messrs. Stabb and Hepburn, Mr. Morry having declined to sign it. As to the objection that this award "does not determine upon all the points submitted,"

it appears impossible to me for any one to come to that conclusion even upon the most stringent and critical comparison and consideration of the terms of the reference and of the award. The real and substantial question involved in the reference was the quantity or extent of water privilege, and it is said that that has not been determined by the award; but it appears to me that, looking merely at these documents, that the rights of the parties in the water-privilege where their properties adjoin are as plainly and distinctly set forth as any language could convey, and that, having regard merely to these documents, it would be the duty of the court to uphold the award and not render nugatory all the proceedings and the judgment of a tribunal selected by these parties themselves to determine their differences. An affidavit, however, of Mr. Wood has been relied upon, in which he states "that one of the principal objects in referring the disputes between the parties in this arbitration was to ascertain and set at rest the rights of the respective parties to the water in front of their respective premises where they adjoin, and to determine whether such rights were exclusive to each party and in common between them. That deponent had several more witnesses to examine that he did not bring forward for the purpose of establishing such right when it was stated on the arbitration by Ewen Stabb, Esq., one of the arbitrators, that the arbitrators were satisfied that such waters had been conveniently used by both parties, and that each had kept alive his claim thereto—whereupon and in consequence of such observation, not dissented from by the other arbitrators, deponent withheld additional evidence upon that point." In reply to this affidavit, Messrs. Stabb, Hepburn, and Walter Grieve, one of the parties to the arbitration, have filed affidavits. Mr. Ewen Stabb, in his affidavit states in reference to the statement of Mr. Wood's affidavit, "that he has no recollection of, nor does he believe that such observations, or to the like purport, were then or at any other time made by him, and this deponent was fully impressed with the belief that the examination of witnesses and the hearing had terminated with the full concurrence of both parties and counsel. That deponent remembers having remarked that an exclusive right to the whole cove had not been established, and that the right of the parties to the water in front of their respective premises had not been extinguished, in which deponent and his brother arbitrators concurred. And this deponent saith, that after a patient hearing of the evidence

and counsel on both sides, and after careful examination of the premises and of the plans produced by the parties, and after full deliberation on all matters submitted and brought for consideration, this deponent and F. C. K. Hepburn made their award thereon." The statements in this affidavit are corroborated by the affidavit of Mr. Hepburn, in which he also states "that after much consideration of the matters submitted and examination of the premises, this deponent and the said Ewen Stabb concurred in the award delivered to the parties, and that neither deponent or other of the arbitrators objected to or dispensed with the examination of any witness or witnesses which either party was desirous of producing." In addition to these two affidavits there is the affidavit of Mr. Grieve to the same effect, and there is no affidavit from the third arbitrator, Mr. Morry. Looking fairly at the whole of these affidavits I cannot discover any ground for asking to have this award set aside, with the exception of one which exists in innumerable cases, but upon which the courts never act, namely, that one of the parties to the arbitration is dissatisfied with the award. The law upon this subject is thus laid down in *Russell on Awards*, 250: "The courts are always inclined to support the validity of an award, and will make every reasonable intendment and presumption in favor of its being a final, certain and sufficient termination of the matters in dispute"; and in *Cargie vs. Aitchison*, 2 Barn. & Cr., 178, Best. I said "An award should always be supported unless there were some unanswerable objection to it." In *Woods vs. Griffiths*, 1 Swans 52, it was held that "in construing an award it is the duty of the court to favor that construction which renders the award certain and final"; and in that case Lord Eldon thus expresses himself: "It is extremely clear that every award must be certain and final, but it has, particularly in modern times, been considered the duty of the court in construing an award to find it certain and final, instead of leaving to a construction which, in effect, would destroy nine-tenths of the awards made." Upon all these grounds I am of opinion that this award is upon the face of it certain and final, and that no sufficient ground for disturbing it has been laid before the court, and therefore the rule for setting it aside must be discharged.

Mr. Robinson for plaintiff.

Mr. Carter for defendant.

1856, *December*. HON. SIR F. BRADY, C. J.

Insolvency—Assignment of assets of firm for benefit of creditors—Right of creditor of one of the partners to claim against joint estate of co-partnership—Acceptance by Trustee of deed, and schedule, with indebtedness of creditor of one partner on same, how far bound by.

The members of a co-partnership becoming embarrassed assigned by deed to a Trustee for the benefit of creditors. A schedule of the assets and liabilities of said firm was attached to the deed. Amongst the liabilities was an amount of £800 due by an individual member of the firm to the plaintiff as a marriage settlement under a deed of trust made many years before. The Trustee had accepted the trust, had the deed and schedule delivered to him, realised the assets of the estate, paid the creditors the dividends due but refused to pay a rateable dividend of the amounts realised to the party entitled under the marriage settlement, claim. In a suit claiming to rank as creditors against the joint estate of the co-partnership.

Held—In point of law and strict right, the plaintiff could not have established a claim against the joint estate of the co-partnership until the joint creditors were satisfied; but such a defence is not open to a Trustee who takes the estate subject to and bound by the express trust to pay all the creditors *pari passu*.

THE bill in this cause stated that for some time previous to December, 1851, Michael Kerr carried on business in partnership with one Robert W. Moody, he the said Kerr, supplying from his own resources the funds, stock in trade, and all things necessary for the said trade, and the said Moody giving his time and attendance to the same; that in December aforesaid, the said Kerr entered into a contract of marriage with the plaintiff, Elizabeth, and in such contract and in consideration of such marriage, it was agreed between them that said Kerr should settle on Elizabeth, for her own separate use, the sum of £850 currency; that in pursuance of this agreement an indenture bearing date the 16th December, 1851, was executed between the said Kerr of the first part, the said Elizabeth, of the second part, and James Seaton, of the third part, and thereby the said Kerr covenanted, agreed to and with the said James Seaton, his executors, &c., that he the said Kerr would, after the said marriage, upon demand in writing for that purpose, pay or cause to be paid to the said James Seaton the full sum of £850. The deed contained a proviso that the said Seaton might allow the said sum of £850 to remain in the hands of Kerr as long as he should see fit, upon receiving a warrant of attorney to confess a judgment for the same as security. It then declared the trusts to be that James Seaton should pay the interest upon said sum to Elizabeth during her life, and

after her decease, amongst the children of the marriage, with further trusts in default of issue. The bill further stated that after the marriage, Seaton demanded said sum, when Kerr represented to him that such amount, if paid, would have to be drawn from his trade, where it was then profitably employed, and requested that it might be permitted to remain there on his giving the security mentioned in the marriage settlement, with which request Seaton complied, and obtained a warrant of attorney for said sum. It further appeared that in December, 1853, the firm of Kerr & Moody became embarrassed, and that by indenture of the 3rd December, 1853, between the said Kerr & Moody of the one part, and the said Robert Prowse of the other part, after reciting that they "were indebted to the several persons named in the schedule annexed in the sums of money set opposite their respective names, and being unable to pay the same in full, have agreed to assign all their estate and effects to the said Robert Prowse upon trust for the benefit of their creditors." They thereby assign all their stock in trade, estate and effects, &c., &c., to the said Robert Prowse upon trust to sell and dispose of the same, and out of the proceeds to reimburse himself all expenses, "and then in trust that he the said Robert Prowse, his, &c., apply the residue of the said trust monies in or towards payment or satisfaction of the several debts and sums of money due to the said several persons, parties hereto *pari passu*, and without any preference or priority of payment." A schedule of the assets and liabilities of the said firm to the 30th day of November, 1853, was annexed to the deed, on which, amongst the liabilities of the said Kerr & Moody, this entry appeared—"James Seaton, this amount secured by warrant of attorney as per Michael Kerr's marriage settlement £850." The bill further stated that this deed and schedule upon their execution were delivered to the said Robert Prowse, who thereupon accepted the execution of said trusts, took possession of and realized their stock in trade, and collected their debts to a large amount, but refused to pay a rateable dividend of the amount so realized to the plaintiffs, and prayed for an account and that the defendant might be ordered to pay to the plaintiffs the amount to which they were entitled under the deed and schedule. The defence relied upon in the answer of Mr. Prowse contains important matter to show that in point of law and strict right the plaintiffs could not have established a claim against the joint estate of the co-partnership until the joint creditors were satisfied; but in my

judgment that defence is not open to the defendant, who took the estate subject to and bound by the express trust to pay all the schedule creditors *pari passu*, and without any preference or priority of payment. Although creditors, whose rights and interests were affected by the term of the trust deed, might be able by a proceeding to set it aside as inequitable to them, or have relief against any provision affecting their prior claims, there is nothing in this trust to render it void or fraudulent, or to require the trustee, who assumed the office subject to it, to delay or prevent its operation, if such persons, that is creditors claiming rights paramount to the plaintiffs, do not intervene to control the operation of the deed. It is not questioned that the plaintiffs were the *bona fide* creditors of one of the partners, and the trust in that view, only amounts to this, that in consideration of their making an assignment of their effects to Mr. Prowse, it shall be lawful for a certain separate creditor to prove his debt against the joint estate, and if the schedule creditors had executed this deed with that provision it could not be contended that it would not be binding upon them. So far from there being any proceeding on the part of any creditor to set aside or disturb this trust, there is not in the answer of Mr. Prowse any statement that a single creditor objected to the claim of the plaintiffs, but the evidence is, on the contrary, strong to prove that they acquiesced in it, for they received their dividends, less by the amount of the dividend claimed by the plaintiffs, without objection. Mr. Prowse states in his answer "That he entered upon the business premises of the said firm, took possession of and realized the said stock in trade and effects, and collected their debts and distributed the same rateably to all the creditors of the said firm at the rate of five shillings in the pound, except to complainants, which he retains to await the decision of this court." In *ex parte Sadler*, 15 ves., 52, it was held "that creditors are bound by acting under a deed of composition as if they had signed it"; and in that case Lord Eldon said, "In this jurisdiction, which is both legal and equitable, a creditor who has not signed may be bound if by any act he has assented."—*Ibid*, 59. As this case is before me, I am bound to pronounce a decree in favor of the complainants against the defendant, who, being a mere naked trustee, is here voluntarily resisting a claim in opposition to the express terms of the deed under which he holds the office of trustee and received the property to administer, and which not one of the creditors, for whose benefit the trust

was created, has sought to impeach or disturb, but under which they have acted and received the dividends to which they were, by the terms of the deed, entitled in common with the plaintiffs as schedule creditors under the deed. I do not refer to the parol evidence, because I conceive it altogether unimportant. I shall not at present pronounce the decree with costs to be paid by the defendant, but on that subject I shall hear counsel on a future day and consider the conduct of each party in reference to this suit, and particularly the advice taken by the defendant, and under which the claim of the plaintiff was resisted.

[On a subsequent day the following decree was made]:

The decree which I shall make in this case is that the defendant pay to the plaintiffs the amount of the dividend upon the sum of £850, without costs, but without any deduction therefrom for or on account of the defendant's costs in this cause. From the circumstances disclosed in the evidence on both sides as to the insertion of this sum in the schedule, I feel that I ought not to make a personal order upon the defendant to pay the plaintiff's costs, and, as the other creditors are not before the court, I cannot either direct the plaintiff's costs or the costs of the defendant to be paid out of the funds to which they are entitled; but this decree is to be without prejudice to any right which the defendant may have against the other creditors for payment of his costs in this cause.

1856, *December*. SIR F. BRADY, C. J.

Practice—Attachment—Warrant laid in hands of third party holding order from defendant—Present interest and disposing power.

Where monies were attached in the hands of a third party by the plaintiff, it was shown that for some time previous to the laying of the warrant, the defendant had drawn an order in favor of a creditor of his, and that monies had been obtained on the said order, and were in the hands of the third party when the warrant was laid and was still held by him.

Held—The defendant had never been divested by the operation of the said order of a present interest or disposing power in the money attached in the hands of the third party, and consequently it was properly attached.

THERE was a rule obtained in this case by Messrs. Emerson and Pinsent, calling on the plaintiff to shew cause why the money attached in the hands of and paid into court by Messrs. Barron, Frazer & Co., should not be paid out of court to Ann Gallavan or to the defendant, and why the attachment upon that or any other property of the defendant should not be raised upon the grounds that defendant, at the time of the warrant or attachment being laid, had no then present interest or disposing power in said money; and that the writ of attachment issued in the cause had not been served, and due diligence not used to effect the service, and on the other grounds set forth in the affidavits upon which the rule was obtained.

Mr. Walbank shewed cause on the part of the plaintiff to the rule, and read affidavits of the plaintiff and a clerk of Messrs. Barron, Frazer & Co., the former swearing to the debt for which the attachment had issued, and also that diligent inquiry had been made to discover the defendant's abode, but without effect; the latter, that no order had been accepted by Messrs. Barron, Frazer & Co., and that they had not rendered themselves liable upon any order to the defendant.

The Solicitor General supported the rule and read affidavits of the defendant and of Ann Gallavan, deposing to the fact of an order, under date 22nd June, 1854, having been drawn by the defendant in favour of said Ann Gallavan upon Messrs. Barron, Frazer & Co. to receive defendant's wages as they should become due every month from the New York, Newfoundland and London Telegraph Company; that the order had been given for the board and lodging of defendant and his family; that money had been paid from time to time upon the order: that the order was in the hands of Messrs. Barron, Frazer & Co., but that they refused, on account of a warrant.

of attachment in this cause having been laid in their hands, to pay the balance then due; also, an affidavit of the defendant's attorney, that on the 24th October last the writ of attachment had been issued, and that on the 31st an alias writ had issued; that neither of such writs had been served upon defendant; that upon application on the 19th Nov., at the sheriff's office, he was informed that neither the plaintiff nor his attorney, nor any other party on his behalf, had given information to the sheriff or his officer, or had taken any steps to enable them to effect the service of the original writ upon the defendant, and that the alias writ had never been deposited with the sheriff. The defendant also deposed that he had not endeavoured to conceal himself, but had been walking about St. John's and transacting his business in the usual manner since his return from the telegraph line on the 21st October last; that no writ had ever been served upon him, and that no notice had been given him by plaintiff, or any one on his behalf, of the issuing of the writ or commencing of any action.

It was held by the Court, in the first place, that the defendant had never been divested by the operation of the said order of a present interest or disposing power in the money attached in the hands of Barron, Frazer & Co.; and secondly, that it was the duty of defendant, if, with the sense that the demand made upon him was not due, and with a view to release any property attached for such demand, he desired to try an action to test the validity of the claim, to place himself in such a position as to enable the plaintiff to proceed in the action, and that the Court had, therefore, no power to order a release of the attached property upon that ground.

The rule was therefore discharged.

Mr. Walbank for plaintiff

Mr. Emerson and *Mr. Pinsent* for defendant.

118 **WHELAN v. NEW YORK, NEWFOUNDLAND
AND LONDON TELEGRAPH CO.**

1857. BRADY, C. J.; DES BARRES, J.; SIMMS, J.

Practice—Evidence—Admission of parol evidence to explain agreement where silent as to time.

In an agreement made between the plaintiff and the defendant company to enter into the service of the latter, no time was fixed for the commencement of the service. In an action for wages over and above the amount allowed by the defendant, the Court admitted as evidence the parol admission of the company's agent to show what had been contemplated at the time of making the agreement, as data from which to ascertain what was a reasonable time.

THIS was an action of *assumpsit* brought upon an agreement by which the Telegraph Company agreed to employ the plaintiff, and the plaintiff agreed to serve the said company, as a laborer on the line of electric telegraph during the past summer. The agreement had been entered into on the 2nd of June last by the plaintiff and upwards of one hundred and thirty other men, belonging to Allan and Cuddihy's gangs. No time had been fixed in the agreement at which the said men should be sent on to their work on the line. They were detained in St. John's from the time of signing the agreement until the 26th of June, when they were shipped off in the sailing vessel *Wilford Fisher*, which vessel was, on the 30th June, on her voyage with the said men to White Bear Bay, lost at Cape Race, where the men were detained until the 17th July, when they were taken off by the company's steamer *Victoria* and conveyed to the place of destination, and thence to their arrival here were employed in the service of the company on the line. The company refused to pay them for any longer period than from the 2nd July.

The plaintiff and said men claim to be paid from a reasonable time after signing the agreement. The case was tried by a special jury—for which a rule had been obtained by the defendants.

Mr. Hoyles moved upon affidavit for the postponement of the trial, on the ground that the subscribing witness to the agreement was absent from St. John's. The Solicitor General admitted the execution of the agreement, and then opened the case to the jury and proceeded to call the witnesses for the plaintiff.

Mr. Hoyles objected to the reception of evidence of facts and circumstances, amongst others the admission of the company's agent to show what had been contemplated at the time of

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making the agreement, as *data* from which to ascertain what was a reasonable time.

The Solicitor General replied.

The Court reserved the point.

The case having closed, the Chief Justice charged the jury, leaving it to them to say from a proper consideration of the evidence on both sides, what was a reasonable time; and concluded by remarking that he felt assured there was no necessity to caution them against allowing any consideration of the wealth of the defendants and of their being a public company, on the one hand, and the fact, on the other hand, of the plaintiff being a poor man, to weigh with them in the least in taking from the company one single shilling, if they did not believe the plaintiff fully entitled to it.

Verdict for the plaintiff, £3 10s. currency.

Mr. Hoyles subsequently moved for a rule for a new trial on the point reserved.

The Solicitor General opposed.

The judgment of the Court was as follows:—Upon the authority of *Ellis vs. Thompson, 3 Meeson and Welsby, 445*, we are of opinion that the parol declaration of Ellis (the company's agent) was admissible for the special purpose for which it was received, and that we could not exclude it if the case were tried again. The rule for a new trial must, therefore, be discharged.

Solicitor General, Mr. Pinsent and Mr. Emerson for plaintiff.

Mr. Hoyles, Q. C., for defendant.

120 NEVILLE AND JACK v. EQUITABLE FIRE
INSURANCE COMPANY.*

1857, *January*. BRADY, C. J.

Insurance—Fire—Condition, hazardous communication with property insured, what is—How far policy is an indemnity against negligence.

Policies of insurance were effected on property which was destroyed by fire on June 10th, 1857. The defendant Company resisted paying on several grounds, amongst others that the insured had not complied with the condition in his policy to the effect "that the risk shall not be increased by any hazardous communication with the property insured without making the same known to the Co., and have it endorsed on their policy." The property was destroyed by a fire caused by the innocent lighting of a candle upon the loft of the barn, which it was contended was a breach of the foregoing condition.

Held—(In charging the jury). The condition relied on had no application to the present case. It is against such a risk—losses caused by negligence where there is no fraud—that insurance is effected. If the premises be burned down through the negligence of the assured, yet the policy of insurance is an indemnity against that negligence.

IN the Central Circuit Court, the Chief Justice on the Bench, on Saturday, the 8th instant, came on for trial the case of John T. Neville and Henry Jack against the Equitable Fire Insurance Company of London, claiming for loss sustained by fire on the 10th of June last, under policies issued by the agency of that company at this place.

Hugh W. Hoyles, Esq., opened the case for the plaintiffs, stating the purely accidental occurrence of the fire and the loss sustained by the plaintiffs, and called upon the jury to find a verdict for them in accordance with the terms of their policies.

The witnesses called, on the part of the prosecution, clearly and satisfactorily proved to the following effect, that on the night of the 10th June, about eleven o'clock, as Mr. Neville was preparing for bed, he was alarmed by the violent yelling of a favorite dog in the stable, and fearing some accident had befallen it, he hastened out to the stable, which adjoined the house, and on opening the stable door a volume of smoke rushed out; (having called, on his way out, his servant man and girl), he and the man, first of all, though with much difficulty, liberated the horses, next the sheep, and then with the aid of a few neighbors who had in the meantime gathered, endeavored

* This report, though strictly speaking not a judgment of the Supreme Court, nevertheless containing as it does the law as regards insurance laid down by the Chief Justice in his charge to the special jury, is considered of sufficient interest to be placed amongst the regular judgments of the Court.—[EDITOR.]

to extinguish the fire, but from the ascendancy it had gained, and the dry state of everything about, their comparatively feeble endeavors were unavailing. Mr. Neville, therefore, with such assistance as he had, directed all their efforts to endeavor to save as much of the farm stock in and about the stable, and of the furniture in the house as they possibly could.

The case of the plaintiffs having been closed, the Attorney General addressed the jury, on the part of the defendants, with his usual eloquence, force, ability and skill.

The Chief Justice, in charging the jury, adverted in the first instance to what was observed by counsel for the defendants, that jurors were in the habit of leaning against the underwriters in insurance cases and allowing their sympathies for the insured to favor their claims, and said, I repeat now the caution, which I have frequently given here, that you will not suffer any bias of that kind to influence your judgments, for in no country in the world should the just rights of underwriters be more sedulously respected and upheld than in this; where, from the fearful destruction of property by fires, thousands would be beggared, were it not for the capital invested in our Insurance Companies. I would also impress you with another caution, not to permit anything you have heard of this case, before you were sworn to try it, to rest upon your minds or affect in any respect your decision, because much is said in a small community like ours, when a transaction such as we are investigating occurs, which has no foundation in fact, although calculated to make very erroneous impressions.

The plaintiffs in this case have brought their action against the defendants "The Equitable Fire Insurance Company," and in that action they claim to recover £229, under three policies of insurance effected upon their property by the defendants, and the defendants resist the claim upon these grounds—that some of the conditions of the policies have not been faithfully observed, that others have been violated, and that the loss was not accidental but was fraudulent loss caused by design. The first policy is dated the 29th July, 1854, and was for £100, at 25 shillings per cent. on the dwelling-house of the plaintiffs, £80, and on their stable £20. If you should be of opinion that the plaintiffs have established a right to recover, you will have no difficulty as to the amount for which you ought to find on foot of this policy, for they have given clear proof of their interest in this property to the extent of £100,

and for that amount they would be entitled to your verdict so far as their claim rests on this policy. The second policy was also for £100 "on their household furniture, linen, wearing apparel, printed books, and plate contained in their house or cottage. In reference to this policy the defendants say, in addition to their main grounds of defence, that the plaintiffs claim to recover the value of property not covered by the words of the policy, and also the property which did not belong to them, but belonged to their servants, and in which they had no interest; and it is my duty to tell you that if you should find a verdict for the plaintiffs, you ought to allow them under this policy for so much only as is proved to be their own property and such as is embraced in the words of description used in the policy. The third policy was also for £100 "on their live stock, carriages, harness, and fodder contained within or without their buildings," and the amount you ought to award to the plaintiffs under this policy, in case you find for them, should be determined by the same considerations I have stated in reference to the second policy. The fire, as you remember, occurred on the night of the 10th June. The defendant, Neville, stated that about 11 o'clock that night, before he had gone to bed, the unusual yelling of his dog in the stable aroused him, that he ran from his parlor to the kitchen, where, from the smell and the smoke, he at once discovered that there was a fire, that he called up his servants, and then ran out to the stable which adjoined his dwelling-house, and on opening the door he saw that the floor of the loft was in a blaze. The only cause to which he is able to attribute this fire is that he and his servant-man, who had only come into his employment on that or the previous day, were in the loft about 7 o'clock on that evening with a lighted candle, for the purpose of cutting chaff for the horses, and that a spark may have then fallen and ignited the hay or chaff upon the loft, which, after smouldering for some hours, burst into the flames as he discovered it. If you believe this to be a true representation of this occurrence, and if the evidence which you have heard from the plaintiffs and from their witnesses satisfy you that the fire was caused in the way suggested, or was in any other way the result of accident, the plaintiffs have, by the production and proof of their policies, established a *prima facie* case to recover the amount of the losses they have sustained. The defendants, however, rely upon several grounds of defence against the claim of the plain-

tiffs, and here I willingly acknowledge the zeal and ingenuity of the learned counsel who represent the defendants, who, although they disclaim raising any technical objections against the claim of the plaintiffs, I am bound to say, that in my judgment, they raised every possible objection that could be suggested, and that some of their objections were frivolous and wholly untenable. The counsel for the defendants insisted that the conditions endorsed upon the policies were violated or not complied with, and it is my duty to tell you that if there be a wilful violation of any of these conditions in any matter material to the contract or to the risks against which the underwriters insured, the plaintiffs would thereby forfeit every right which they otherwise would have had under their policy, and the defendants would be entitled to your verdict. They rely in the first place upon a violation of the third condition which states that, "If, after an insurance shall have been effected, the risk shall be increased by the erection of any stove or apparatus for producing heat, or if any hazardous operation or trade shall be carried on, or any hazardous goods be deposited, or any hazardous communication be made, and the same be not made known to the office, and endorsed on the policy, and an additional premium if necessary be paid, the insured shall not be entitled to any benefit under the policy." It has been gravely argued by the Attorney General, that the bringing of the candle, however innocently, upon the loft, in the manner you heard described in the evidence, amounted to such "a hazardous communication made" as caused a forfeiture of the rights of the plaintiffs under their policy. And this objection is raised on the part of the defendants who disclaim resisting the demands of the plaintiffs upon technical or formal grounds; but without any direction from me, and without the learned lore of lawyers, your own good sense and sound judgments would repudiate such a position as one wholly without foundation, and would tell you that that condition had no application to the circumstances attending the loss in this case. It would be an easy answer to the claims of the insured in the "Equitable Fire Insurance Company" to say that the loss happened by reason of your own want of care and caution in taking a candle to this part or to that part of the premises insured; but it is against a risk of that nature, against losses caused by acts of negligence where there is no fraud, that we insure and are entitled to indemnity against the underwriters. In *Shaw*

124 NEVILLE AND JACK *v.* EQUITABLE FIRE
INSURANCE COMPANY.

v. Roberts, 1 Nev. and p. 279, 6 Ad. and El. 75, it was held that "If premises be burned down through the negligence of the assured, yet the policy of insurance is an indemnity against that negligence." So much for that ground of defence. The defendants next rely upon violations of the 9th condition, which, as far as it applies to this case, is as follows: "All persons insured by this company sustaining any loss, &c., are forthwith to give notice to the agent," &c., which was done in this case, "and within one calendar month after such loss, &c., has occurred, are to deliver in as particular an account of their loss or damage as the nature of the case will admit of, and, if required, make proof of the same by their oath or affirmation, &c., and give such further explanation thereon as shall be necessary; until such affidavit, &c., are produced, and such explanation given, the amount of the loss shall not be payable; also, if there be found to be any false swearing, or attempt at fraud, collusion, or wilful mis-statement on the part or in the behalf of the person insured, or if it should appear that the fire shall have been occasioned by any wilful act or connivance on his part he shall forfeit all claim to restitution or payment by virtue of his policy." The account of the loss in this case was not delivered into the office within the period specified, which, under other circumstances, would have been fatal to the claim of the plaintiffs, but the delay in this case is not relied upon as an answer to this action, because it could not be relied on to that extent, their agent having been a party to that delay just as much as the plaintiffs; it is, however, relied on as one of the ingredients of that fraud which is imputed to the plaintiffs and upon which the defendants claim your verdict. The defendants next insist that there has been an "an attempt at fraud and wilful mis-statement" within the condition in putting forward a claim for the value of the clothes which belonged to their servants, and also for the value of property of their own which was not within the description of the property which was covered by the words in the policies. On this part of the case I tell you, in the strongest language I can use, that if you believe these mis-statements were wilfully made with the intention of defrauding the defendants you are bound to give the underwriters the benefit of this part of their contract, whereby the plaintiffs forfeit their rights under the policies and you ought to find a verdict for the defendants. Lastly, the defendants contend "that the loss was occasioned by the wilful

act of the plaintiff, Neville, or by his connivance; that he knew the fire was caused by design, and that he falsely represented it to have been accidental." This defence involves charges of the gravest character against one of the plaintiffs, and, I need hardly tell you, if the evidence satisfies your minds beyond all doubt that he either wilfully caused the fire or that it was caused by design with his knowledge or by his connivance, that he cannot derive any benefit under these policies, and that you ought not to hesitate in finding a verdict for the defendants. But, before you do so, the law of England and of this country says that that conviction should be made so clear to your minds that if the party charged with such misconduct were upon trial for the offence of arson you would be prepared to find him guilty. The Attorney General, in his address to you on his own part and on the part of the local directors of the company, disclaimed imputing to the plaintiff, Neville, the setting fire wilfully to these premises, and shifted his defence to this, that without saying who committed that crime, Neville knew the fire was caused by design, and having falsely represented on his oath as accidental he has forfeited his right to recover. In short, that if he were not guilty of arson he was guilty of wilful and corrupt perjury. Gentlemen, that disclaimer came too late, after the whole of the evidence on behalf of the plaintiffs had been laid before you, and after the whole of the cross-examination of the plaintiff, Neville, was directed to lead your minds to the conviction that he was the individual who wilfully set fire to these premises and that his own hand communicated that fire. What then is the evidence in this case to sustain that accusation? The defendants have not called a witness, but they rely upon some discrepancies in the evidence of Neville and of his servant man, Ruby, of the value or materiality of which you are to judge. It is, however, of importance to consider how this evidence was procured. It appeared that the directors, before they would settle the demand of the plaintiffs, required them to produce before them all their witnesses, and also that they should themselves submit to an examination, and these gentlemen, with their counsel present, examined all these parties separate and apart from each other, and thus obtain those discrepancies in the testimony of the witnesses upon which they now rely. I strongly advise you to act with great caution upon evidence derived from a proceeding of a character so inquisitorial, so unfair. The plain-

tiffs were not bound to submit to such an ordeal; they were bound to give every explanation in their power as to the origin of the fire and other matters connected with the loss; the directors had a right to such explanation and the plaintiffs were bound to furnish it; but for underwriters to tell the insured that before his claim against them can be paid he must produce before them for their private and secret examination every witness he has to sustain his rights in a court of justice against them, if he should be compelled to resort to that tribunal, is a proceeding which, to say the least of it, ought to be regarded with the greatest jealousy and suspicion. In this case the plaintiffs have submitted to that enquiry, and themselves and their witnesses have been all examined in the presence of the directors, and, so far, that is a circumstance in their favor, for it goes to show that they had nothing to conceal; but if, however, the result of that examination and the evidence you have heard in this case brings to your minds a clear conviction that the plaintiffs, or either of them, or any other person with their assent or at their instigation, caused this fire, and, in consequence, the loss of the property for which they now claim to be indemnified, or have been guilty of that wilful and corrupt perjury which is imputed to Neville, I tell you that you ought not to allow them one shilling; but if the evidence fails to establish these grounds of defence you ought to give the plaintiffs every farthing to which you believe they are entitled under the policies.

The jury then retired, and shortly afterwards returned into Court with a verdict for the plaintiffs of £222 9s. 5d.

Mr. Hoyles, Q. C., for plaintiffs.

Attorney General for defendants.

1857, *January*. HON SIR F. BRADY, C. J.

Insurance—Marine—Seaworthiness.

Where a vessel three or four hours after leaving port, and not from any extraordinary peril of the sea, was found to be in a leaky condition and being abandoned by her crew, immediately sunk, the Court left it to the jury to say whether or not she was in a seaworthy condition at the time of leaving port.

ACTION of assumpsit for £92 2s. 10d. currency, upon policy on goods, &c. By the policy certain goods and merchandize on board the schooner *Whim* were insured from a port in White Bay to St. John's. The plaintiffs' witnesses proved the departure of the *Whim* from Fleur de Lys, a port in White Bay, during the past autumn; she left at night, and three or four hours after the vessel was discovered to be in a leaky and dangerous condition when the crew abandoned her and she went down.

Mr. Hoyles submitted to the Court that there was no case to go to the jury. Here a vessel leaves a port in the night in good weather, and three or four hours after something happens to her; she becomes leaky and rapidly fills, the crew don't try the pumps, but abandon the vessel, which shortly afterwards goes down. It is for the plaintiffs to make out a fair *prima facie* case, and especially in this case to explain to the full satisfaction of the jury the cause of the disaster to the vessel. Mr. Hoyles then quoted several authorities, amongst others Arnold on Insurance, page 655-6, "Where a ship becomes so leaky or disabled as to be unable to proceed on her voyage, soon after sailing on it, and this cannot be ascribed to any violent storm or extraordinary peril of the seas, the fair and natural presumption is that it arose from causes existing before her setting out on the voyage, and consequently that she was not seaworthy when she sailed. In such case therefore it is incumbent on the assured to show that at the time of her departure she was in fact seaworthy, and that her inability has arisen from causes subsequent to the commencement of the voyage. *Per Lord Eldon in Watson v. Clarke, 1 Dow. 344; Munro v. Vandam; Park on Ins., 469, 8th ed.* If a ship a day or two after sailing becomes leaky and subsequently founders, without any storm or other visible or adequate cause to produce this effect, the presumption is that she was not seaworthy when she sailed, and it lies on the assured to prove that she was."

Here, however, the learned counsel argued, no evidence as to the cause of the foundering has been given, the plaintiffs have failed to establish a *prima facie* claim, and they must be nonsuited.

Court retire, and after deliberation decide that there is a sufficient case to go to the jury.

Mr. Hoyles addressed the jury at great length, and based his defence upon two grounds, 1st, circumstances as detailed by witnesses demonstrate that the loss was not a fair one; 2nd, either the loss was not a fair one or the vessel was not seaworthy. The defendant called no witnesses.

The Chief Justice charged the jury. His lordship referred to evidence of plaintiffs' witnesses, and circumstances out of which present claim arises; their decision will rest upon two questions of fact which his lordship will submit to them. The defendants agree, if their defence be found insufficient and unsustainable, to pay the whole amount, so there will be no matter of computation for jury. It is not because underwriters can afford to pay, that the same strict justice should not be afforded them as if they were poor. As twelve honest men, representing the country, and bound by the most sacred obligations, they are bound to meet out impartial justice not only to the plaintiff but to the defendant, to investigate the case as one between man and man, without reference to the poverty of one party or to the affluence of the other. Defence rests on two grounds, viz.: unfair loss and unseaworthiness. The jury must be satisfied that this is an honest action, to be so they must be assured, 1st, that the ship at the time of her departure was seaworthy. Now if party insures ship or goods in ship, he pledges the seaworthiness of such ship. The meaning to be attached to the term seaworthiness must depend entirely upon the circumstances under which the policy is effected—for instance the designation of the vessel, the length or shortness of the voyage, the distance, the period of the year, &c, all these would more or less amplify or contract the construction of the term. If they are satisfied that the vessel was seaworthy, then the first point of defence is settled; but it is laid down by the highest authorities that if a vessel leaves a port, and of a sudden sinks, the natural presumption is that she was not seaworthy; where ship is not seaworthy policy is void, where the insurance is upon the ship as where it is upon the goods, the onus of proof thereof rests upon the plaintiff.

The second point of defence raised is that the loss was not a fair one; and, with reference to this defence, His Lordship would solemnly impress upon the minds of the jury that if they believed from the evidence the loss was fraudulent, the interests of trade and society in general would be prejudiced materially if the jury countenanced this claim; but if, on the other hand, the evidence satisfied them that the loss was fair, the interests of the plaintiff should be protected.

The jury, after over one hour's consideration, returned a verdict for the plaintiff, £95 2s. 10d.

Mr. Robinson, Q. C., and Mr. Whiteway for plaintiffs.

Mr. Hoyles, Q. C., for defendants.

130 THOMAS ET AL v. THE ST. JOHN'S MARINE
INSURANCE COMPANY.

1857, *January* HON. SIR F. BRADY, C. J.

Shipping—Advance on freight, insurance on same—Failure of ship to complete voyage—Freight, and freight pro rata, liability of Insurance Co. for.

A cargo of fish shipped at St. John's, Newfoundland, was, by the bill of lading, to be delivered at a port or ports of Spain or on the west coast of Italy or Sicily. The plaintiffs advanced to the master in St. John's £300 on account of the freight to be earned. The plaintiffs insured with the defendant their advance by a policy of insurance. On the voyage the ship experienced tempestuous weather, and in consequence became damaged and bore up for Fayal, from where she proceeded, after effecting repairs, to Liverpool in ballast. The cargo, on the advice of surveyors that it would not be fit to reship by reason of deterioration, was sold at auction at Fayal with the consent of the master, who undertook to act as agent for all the parties interested, but without the knowledge of shippers or consignees. No new contract for freight *pro rata* was made. Upon a special case stated for the opinion of the Court two questions were submitted: 1st. Whether freight *pro rata* ought to be paid the ship? 2nd. What amount, if any, the plaintiffs were entitled to recover from the defendant?

Held—As to the first question, there was no liability for freight *pro rata*. In order to establish such a claim there must be a voluntary acceptance of the cargo at an intermediate port in such a mode as to raise a fair inference that its further carriage was intentionally dispensed with. The right to freight *pro rata itineris* must arise out of some new contract between the master and the merchant, either expressly made by them or to be inferred from their contract.

Held—As to the second question, the underwriters cannot be held liable for any freight.

THIS case came before the Court in the form of a special case and was recently ably argued before me by Mr. Robinson for the plaintiffs and by Mr. Hoyles for the defendants. I have since then given it a great deal of consideration, and, as it is a case which I must decide rather upon the legal principles bearing on the questions involved in it than upon any decided case which would govern it, I have deemed it right to give at length the grounds upon which I rest my decision.

The special case was in these terms: "The plaintiffs, in Jan. last, shipped in St. John's, on board the *Louis Napoleon*, 2,400 qtls. dry codfish, for a port or ports in Spain or the west coast of Italy or Sicily, freight to be paid thereon, pursuant to charter party and bill of lading annexed. The plaintiff advanced to the master in St. John's £300 currency, on account of the freight so to be earned. The ship sailed with the said fish on the 24th January, 1857. The plaintiffs insured with defen-

dants their said advance by policy hereto annexed. The ship experienced very tempestuous weather on her voyage, and in consequence thereof was damaged and leaky, and in consequence the crew refused to proceed on the voyage and bore up for Fayal, where she arrived on the 16th February, and remained there until April following to complete her repairs that were necessary, when she went to Liverpool in ballast. In order to effect these repairs it was necessary to discharge the whole cargo, and, on the ground of the long delay required for such repairs, and the liability of the fish to deteriorate in that climate, and that, in the opinion of competent surveyors, the fish would not, when such repairs were completed, be fit to reship, the said cargo was, by the advice of such surveyors, sold at Fayal by public auction, by the captain, acting according to his judgment for the best, as agent for all the parties, but without the actual knowledge of shippers or consignees. Of the proceeds, £123 17s. 10d. were retained by the master to defray the balance of the repairs and expenses of the ship, and the residue was paid over to the captain by bill of exchange, which he transmitted to the plaintiffs, who are required by the owners of the cargo to send in the same to them. No new contract for payment of freight *pro rata* was expressly made. The plaintiffs have not been repaid any portion of their said advance of £300, which they seek to recover under the circumstances from the defendants. The questions are:

1st. Whether freight *pro rata* ought to have been by law paid to the ship.

2nd. What amount, if any, the plaintiffs are entitled to recover from the defendants?

If the opinion of the Court shall be in favour of the plaintiffs, judgment shall be entered up for the amount ordered and costs as upon a confession; if the opinion shall be in favour of the defendants, judgment shall be entered up for them, as upon a *nolle prosequi*. By the charter party it was agreed that the master should take on board "a full and complete cargo of dry codfish in bulk, not exceeding 2,700 quintals, and therewith proceed to a port or ports in Spain or the west coast of Italy or Sicily, and there deliver the same to the freighters," &c., they paying freight for the same, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted." The risks

which the defendants undertook to bear were thus expressed in the policy of insurance, "Touching the adventures and perils which the assurers are contented to bear and do take upon themselves in this voyage, they are of the seas, men of war, fire, enemies, rovers, pirates, thieves, jettisons, letter of mart and counter-mart, surprisals, taking at sea, arrests, restraints and detainments of all kinds," &c, "and all other perils, losses, misfortunes, that have or shall come to the hurt, detriment or damage of the said goods or any part thereof."

The first question then upon these facts is, whether freight *pro rata itineris peracti* was earned by the ship? Mr. Robinson, on the part of the plaintiffs, contended that such freight was not earned, but that there was a total loss of freight by the perils of the sea; while Mr. Hoyles, for the defendants, contended that the ship-owner was entitled as against the freighter to freight *pro rata*. As the fish was not carried to one or other of its ports of destination, the whole freight was *prima facie* not due; but it was argued by Mr. Hoyles that freight *pro rata* was due on the fish by reason of the act of the master in carefully (as he insisted) selling it at Fayal. To sustain that position Mr. Hoyles was bound to establish to the satisfaction of the Court a new contract, express or implied, between the freighters and the ship-owner or his master, as his agent, for the payment of such freight. In *Abbot on Shipping* (8 ed.), 448, the principle is thus clearly stated, "Freight *pro rata* must arise out of some new contract, express or implied"; and again, in page 448, the writer adds, "Upon a review of the cases it will appear that, considering the subject with regard to the proceedings in the courts of common law of England, the right to freight *pro rata itineris* must arise out of some new contract between the master and the merchant, either expressly made by them or to be inferred from their conduct." In the present case there is no express contract relied on, but it was argued that the Court might imply a promise by the freighter to pay freight for the fish to Fayal, because, after the sale of the fish at that place, of which it is admitted in the case the freighters had no knowledge, the proceeds were remitted to the plaintiffs, "who are required by the owners of the cargo to send in the same to them." Let me suppose that this amounted to some evidence, which I own I do not think it does from which a promise to pay freight *pro rata* might be inferred, in my judgment no jury would be warranted, in the absence of any other cir-

circumstance, in inferring from it such a promise and thus impose a liability upon an individual to pay a sum of money, which without such promise, he would be under no moral or legal obligation to pay. In the case cited by Mr. Robinson, the most recent authority on this subject, *Vilerboon vs. Chapman*, 13 Mees. & W., 230, where "A cargo of rice shipped at Batavia, was, by the bill of lading, to be delivered at Rotterdam to the plaintiff, he paying freight for the same, and the vessel having encountered a hurricane was compelled to put into Mauritius, where the rice having been found to be damaged and in a state of rapid putrefaction, was of necessity sold by the master, who acted *bona fide*, but without the knowledge of either the shipper or ship-owner—it was decided that no freight was due either for the whole voyage or *pro rata itineris*" In delivering the judgment of the Court, Baron Parke thus states the principles which govern cases like the present: "It was conceded that the true principle upon which this description of freight is due is that a new contract may be implied to pay it, from the acceptance by the consignee of his goods delivered at an intermediate port instead of the destined port of delivery. This is the doctrine in the case of *Hunter vs. Prinsep*, and of the more recent American case to which we were referred in Mr. Justice Stowe's edition of *Abbot on Shipping*, p. 329, and which doctrine may be shortly stated to be this, that for a *pro rata* freight there must be a *voluntary acceptance* of the goods at an intermediate port in such a mode as to raise a fair inference that the further carriage of the goods was *intentionally* dispensed with. It was argued on the part of the defendants, and we think rightly, that the point decided in the case of *Hunter vs. Prinsep* was no authority against the defendants, for there the captain wrongfully sold a part of the cargo at an intermediate port, and was in no respect the agent of shipper in so doing, nor was he made so by the subsequent receipt by the ship-owner of the proceeds (which operated only as a waiver of one species of remedy by action for the tort) and consequently there was no ground to infer a new contract between the shipper and ship-owner. But it was said that where the goods were lawfully sold from necessity the case was different, for that in such a case necessity imposed upon the master the character of agent for the shipper in addition to his ordinary one of agent for the ship-owner, and that, having double agency, he might be presumed to have intended to make a rea-

sonable contract between his two principals, that is, on behalf of the ship-owner to give up the goods at the intermediate port instead of carrying them on, and on behalf of the shipper to receive them there and pay reasonable freight for the part of the voyage already performed. It is difficult to conceive any conjuncture in which such a presumption could be made, for the agency of the master from necessity arises from his *actual inability* to carry the goods to the place of destination, which dispensed with the performance of that primary duty altogether, and the right to freight *pro rata* from the presumed waiver on the part of the shipper of the performance of a duty which the master was ready to execute. At all events, we think that no such presumption can be made in this case. According to the statement on the special case an emergency had arisen in which, as the law is laid down by Lord Stowell in the case of the *Gratitudine*, the authority of agent for the shipper necessarily devolved upon the master to do the best for his interest, and that was to sell, because the cargo was perishable and would have perished if it had been left at the Mauritius or attempted to be carried to its place of destination. This sale, therefore, transferred the property and bound the shipper, but in no other respect did the necessity under the circumstances of the case confer upon him any agency. But if we suppose that he had a further authority, and that instead of being the master he had been super-cargo, and that his sale of the goods had been equivalent to a sale by the defendants themselves present at the Mauritius, there would have been no reasonable ground to infer a new contract to pay freight *pro rata*, for the ship-owner was not ready to carry forward to the port of destination in his own or another ship, and consequently no inference could arise that the shippers were willing to dispense with the further carriage and accept the delivery at the intermediate instead of the destined port. The truth is that the goods were in the same situation as to the claim for freight as if they had been *abandoned* by the ship-owner and left behind at the Mauritius, and there sold by the owner. This view of the case accords with the decision in the American courts to which we referred, *Armroyd vs. Union Insurance Co* ; *Hustin vs. Union Insurance Co*, cited in the note p. 329 of Mr. Justice Story's edition of *Abbot on Shipping*, in both of which it was held that if the cargo is sold at an intermediate port for the benefit of all concerned, no freight is due." On the authority of this case

and upon the principles laid down in the judgment I have just read, I confidently rest my decision on the first question in this case, and hold that the ship was not, under the circumstances stated, entitled to freight *pro rata*; and as to *Baillie vs Modigliani*, 1 Park, 70, the only case cited in support of his views by Mr. Hoyles, I may merely say, as Lord Ellenborough said of it in *Hunter vs Prinsep*, that when compared with the present case it affords no authority in support of the position for which it was cited.

The second question submitted in the case for the consideration of the court "what amount of freight, if any, are the plaintiffs entitled to recover from the defendant?" In disposing of this branch of the case I shall consider it in two points of view. I shall first suppose that the shipowner, and not the plaintiffs, had effected the insurance upon the freight, and determine what, in my judgment, his legal rights would be under the circumstances stated in this special case. Could a shipowner, in such a case as this, who had insured his freight and who had failed to earn it from the freighter, claim the amount of a policy he effected upon it from the underwriters? Mr. Robinson argued that he would be entitled to recover on the grounds that there was a total and honest loss of the freight by the perils of the sea; while Mr. Hoyles contended that the loss was not a loss caused by the perils of the sea, but by the fault of the master in not prosecuting the voyage to one of the ports of destination, and thus earning his freight. Undoubtedly if the master were not justified in law in not prosecuting the voyage, but stopping the adventure at Fayal under the circumstances stated, although he would thereby forfeit his right to freight as against the freighters, he would have no right to cast that burden upon the underwriters. The question then is, what is the duty of the master in case of a disaster such as happened to the ship in this case. In *Arnold on Insurance*, 1141-42, the law is thus laid down: "Where the original ship can be repaired in a reasonable time, or the cargo can be sent on in a substituted ship at a reasonable amount of cost and trouble, and with a fair hope of its ultimately arriving in specie or in merchantable state at its port of destination, it has been held in the United States, and apparently on very sound principles, that the master ought to send it on, and is not justified in selling, and that the shipowner will not be entitled on the ground of the master's negligence or improper conduct, in sell-

ing the goods, instead of forwarding them, to give notice of abandonment, and recover as for a total loss on freight. In these cases in fact the master has a right if he can repair the original ship in a reasonable time, or offers and is ready to send on the goods in another ship, to insist either on keeping or taking on the goods, or on being paid his full freight; whether it would have been wise or foolish in the merchant to have sent on his goods under all the circumstances of the case, is a question which cannot affect the relative rights of the assured and the underwriter on freight, the latter of whom can never justly be made responsible for any loss on freight arising from the neglect or laches of the assured, or of the master as his agent." In *Mondy v. Jones, G Dowl. & Ry*, 479, "Where a vessel having sailed from her port of lading with a cargo of goods was obliged to put back in consequence of a peril of the sea, and it being discovered that part of the cargo, which was taken out was damaged by seawater, could not be re-shipped without a delay of six weeks, the captain in the exercise of a sound discretion, sold the damaged goods, and being unable to supply their place with others, sailed with the remainder and arrived in safety, it was held in an action on a policy on freight for the voyage, that the underwriters were not liable *pro tanto* for the loss of the freight of the goods so sold. In that case, Abbot, C.J, in delivering judgment, said, "The question was, whether under such circumstances the underwriters could be held liable *pro tanto* for the loss of the freight of the goods thus landed and left behind? Though similar circumstances may frequently have occurred, it does not appear that there is any reported case to be found corresponding exactly with the present. Upon the whole we are all of opinion that the underwriters cannot be held liable for this loss. It may be perfectly true that the most prudent course for the master to adopt was to leave the goods on shore, and sail without them; but it does not therefore follow that the underwriters should be compellable to make good the loss of freight incurred by those means. If we were to hold the underwriters answerable for a loss like this, we should be in effect affording a temptation to masters of vessels on all similar occasions to leave part of their cargo on shore and sail without it, instead of waiting till the damage it had sustained was repaired, which would be pregnant with the most mischievous consequences. Great inconvenience would in our opinion result from laying down such a rule as would render underwriters liable in cases like the present.

It may be both just and beneficial that the master should be at liberty to exercise his own discretion, whether it is most prudent to leave damaged goods behind and sacrifice the value of their freight, or to wait till they can be restored to a removeable condition; but it by no means follows as a consequence that even when in the soundest exercise of that discretion, he does leave the goods behind and his owner thereby loses the freight of the goods *pro tanto*, that he should be privileged to throw the burthen of that loss upon the underwriters. There may be cases unquestionably of *extreme necessity* in which the master would be justified in selling a part, or even the whole of a cargo, at a port short of the port of destination; but the necessity which will justify a master in selling the cargo at an intermediate port, and thus terminating the voyage, must be extreme and absolute. If such a necessity does not exist, in case of disaster to his vessel, he is bound to repair it or forward the cargo to the port of destination in another vessel. In *Wilson v. Miller*, 2 Stark, 1. it was held that a captain of a ship was not justified in selling the cargo at a foreign port, although it be impossible to prosecute the original voyage, and although a sale of the goods is the most beneficial course for the owner, unless *extreme necessity* justifies the sale. In that case Lord Ellenborough said, "I think you had no right to determine the voyage and make a general sale of the cargo. Nothing but extreme necessity will warrant the master in making a sale of any part of the cargo, but here he took upon himself to break up the destination of the adventure, and to exercise full dominion by the sale of the whole of the goods. He might have raised something by hypothecation, sufficient probably to pay the expenses of salvage; but he is absolutely a stranger to the dominion over the ship and goods, and he is bound to send back to receive the further directions of the owner, although the consequence may not be so beneficial to the latter. To allow the master such an unlimited dominion as is contended for, would tend to the destruction of all commercial adventures." In that case, as in the present, the cargo consisted of "perishable commodities," and "the captain not being able to procure seamen (at the intermediate port into which he put) considered it *impossible* to prosecute the original voyage."

In another case, *Caunair v. Megburn*, 1 Bing. 247, Park, J., thus expresses himself, "The defendant, therefore, is liable upon his contract, unless he is exempted by some exceptions in it.

What is the exception here? The dangers and accidents of the seas of what kind soever; the plaintiff's goods were not lost by dangers of the seas, and the exception cannot be extended by implication. In *Tremenhere v. Tresilian*, 1 Sid. 452, Lord Hale held that a master of a ship could not sell, nor his transfer confer any property in cases of unyielding necessity. That principle has been qualified in modern times, but even now the master cannot sell except in a case of inevitable necessity, and that very exception confirms the general rule. Such is the rule with regard to ships, and it applies more strongly in the case of goods." He added, "Nothing therefore but extreme necessity will justify the master in disposing of the cargo."

In *Freeman v. The East India Company*, 1 Dowl. & R. 242, Best, C. J., in delivering judgment said, "The question of necessity is a question of fact, which was properly left for the jury to decide, and no man can entertain a doubt that there was no necessity for this sale. The judgment of Sir William Scott in the case of the *Gratitude* is directly against the argument in this case. It is admitted that the captain has no general authority to sell; but, as the learned judge in that case says, 'in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law. but the authority which is forced upon him cannot go beyond the actual necessity existing in the case. The instances put in argument are cases of absolute necessity, but no such necessity existed here, and therefore the captain had no right to assume the character of agent'"

In *Rosette vs. Gurney*, 11 Com. B. R. 176, Jervis, C. J., in delivering judgment—"As a general rule where the whole or any part of a cargo is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a fatal loss." "With respect to the means of conveyance, the master is bound by his contract to carry the goods to their destination in his own ship. If that ship is disabled in the course of the voyage and cannot be repaired at all, or cannot be repaired in time to save a *perishable* cargo, he is empowered, if not bound, to send the cargo on in another bottom, provided, it can be obtained." These cases establish clearly what the law is upon this branch of the case before me, and what must be the amount and extent of the necessity which will justify the master in selling the cargo.

at a port short of the port of destination, and I have now to consider whether that *extreme* and *absolute necessity* has been established in this case which alone would justify the master in selling the cargo at Fayal? The only grounds stated in the case are long delay required for the repairs of the ship and the *liability* of the fish to deteriorate in that climate, and that in the opinion of competent surveyors the fish would not when the repairs were completed be fit to reship, the said cargo was by the advice of such surveyors sold at Fayal by public auction by the captain acting according to his judgment for the best as agent for all parties but without the actual knowledge of shippers or consignees." Put the most favourable construction that it is possible upon this justification for what the master did in this case, and while it does in some degree establish that he ought not to keep the cargo for his own vessel, because of the delay which should take place in preparing her for sea again, it does not suggest the slightest excuse for his not taking the other course which all the authorities say he was bound to take, that is, send the cargo on in another vessel. But independent of that consideration, I feel bound to say that, while the master may have acted most prudently for the interests of the freighter, and that in selling the cargo he did what was most beneficial for him, I cannot derive from the case what would lead my mind to the conclusion that he might not have brought that cargo of fish in his own vessel to the first port of destination, and have earned his freight. The next consideration is, what are the consequences if the master sell the cargo without that extreme and absolute necessity which alone would justify him in selling it. He acts unlawfully and is so far a wrongdoer to the freighter, and he and the shipowner are alone liable for the abandonment of the voyage, which cannot in such cases be attributed to the perils insured against.

In *Van Omeron vs. Dowick*, 2 Canap. 42, it was held that, "Although the captain of a ship find it impossible to reach his port of destination, he has no implied authority to sell the cargo in a foreign port into which he is driven for the benefit of the shippers, and if he does so, though acting *bona fide* for the interest of all concerned, this is a tortuous conversion for which the shipowner is liable." In that case Lord Ellenborough said, "I am decidedly of opinion that you had no right to sell the goods. Expediency might require this step, but the captain could not put himself in the situation of the owner of the goods,

and when he thus disposed of them, in point of law he was guilty of a tortuous conversion; whatever power he might have to sell a part of the cargo for repairs, he could not lawfully put a stop to the voyage, and it is difficult to say that there was a natural impossibility of proceeding to Surinam."

In *Hunter v. Princep*, 10 East. 378, "where in a charter party freight was to be paid at so much per ton on a right and sure delivery of the homeward bound cargo from Honduras Bay to London, and the ship and cargo after capture and recapture having been wrecked at St. Kitts, into which they were carried by the recaptors, a sale of the cargo directed by the Vice-Admiralty Court there, on the application of the master acting *bona fide* for the benefit of all concerned, but without orders from any—and the proceeds of the sale were remitted to the shipowners, it was held that the sale having taken place at the instance of the master, amounted to an unlawful conversion of the property, and discharged the claim of the shipowners for freight *pro rata itineris*."

In the present case also there was not a legal justification for the sale. Under the circumstances the master was guilty of an unlawful conversion, which discharged his claim to freight either against the freighters or against the underwriters if he had insured his freight. Upon these grounds therefore, holding that the shipowner, if he had insured his freight, would not have a right to recover from the underwriters, it remains for me to consider whether the plaintiffs who made an advance upon the security of the freight to the master and insured his interest in the freight, can stand in any more favorable position as against the underwriters than the shipowner himself had he been the assured. On principle it appeared to me plain that he could; that they could at most be regarded as equitable assignees of the freight to the extent of their advance, and to that extent they stood in the shoes of the shipowner. In *Campbell v. Thompson*, 1 Stark, 490, Lord Ellenborough ruled that the assignee of freight could not stand in a better situation than the shipowner as to his rights respecting freight; and the same principle is laid in an elaborate judgment of Baron Parke's in the case of *Chapman v. Benson*, 5 Com., B. R. 358-359.

Upon all these grounds, I feel bound in this case to give judgment for the defendants, without intending to express any

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opinion as to the rights which the plaintiffs may have against any other parties

Mr. Robinson for plaintiffs.

Mr. Hoyles for defendants.

GERAN & JACKMAN, EXECUTORS OF GERAN v.
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1857, *January*. HON. SIR F. BRADY, C. J.

Insurance, Marine—Constructive total loss—Bottomry bond—Substitution of new for old material, application of rule where vessel is lost before voyage is completed.

The plaintiffs ship whilst on a voyage from St. John's, Nfld., to Montreal, Canada, sustained damages by going on shore which necessitated considerable repairs. The consignees having effected the same to the value of £253 11s. took as security a bottomry bond. Having proceeded on her homeward voyage she again went on shore and became a total loss. Having been sold at public auction the amount of the bottomry bond was paid out of the proceeds of the sale to the holder thereof. In an action for the insurance on the ship the jury found a verdict for the plaintiffs. On a rule to set aside the verdict and have a new trial, it was contended by the defendant company, (a), that the nett proceeds of the sale was theirs and that the amount applied for payment of the bottomry bond ought to be deducted from any amount for which under their policy they were found to be liable, and (b), that they were entitled also to deduct one-third of the cost of the repairs (£253 11s. 0d.) in conformity with the rule of "substitution of new for old material."

Held—The payment of the bottomry bond was a fair and legitimate disbursement from the proceeds of the sale,

Held—If after the repairs to a ship whether they belong to general or particular average, the ship be lost, in the continuation of the voyage, the rule for deducting, the one-third, does not apply. It is only by reason of the ship coming to the owner enhanced by the repairs that the one third of the value of the repairs is brought to his charge.

ACTION of debt to recover £853 11s. 6d. currency on policy No. 532.

The plaintiffs, by John J. Gearin, their agent, on the 12th September, 1854, insured their vessel, the *Clipper*, lost or not lost, from the noon of the 12th September until noon of the 30th November, 1854; and also all goods and merchandize therein, beginning the said adventure upon the said goods and

merchandize from the loading thereof aboard said ship until said ship with all her tackle, apparel, and goods and merchandize whatsoever should have arrived at 30th November aforesaid, and until she should have been moored at anchor 24 hours in good safety, and upon the goods and merchandize until the same should be there arrived 72 hours; and that it should be lawful for the said ship, &c., in that voyage, in cases of extremity and distress, to proceed and sail to and touch and stay at any ports or places, without prejudice to said insurance. The ship, goods, &c., for so much as concerned the assured by agreement between the assured and assurers in that policy were valued at £600 currency. The perils insured against were of the sea, of the barratry of the master, of mariners, and of all other perils and losses that should come to the ship or any part thereof, &c.; and in case of any loss or misfortune it should be lawful for the assured, their servants, factors, &c., to sue for labour and travel in and about the defence, safeguard and recovery of the ship, &c., or any part thereof, without prejudice to the said insurance, to the charges whereof the defendants bound themselves to contribute in proportion as the sum insured then was to the whole sum at risk. The policy to be of as much force as any made at Lloyds; the ship and freight were warranted free from average under £5 per cent. unless general, or the ship should be stranded. The rate of insurance being 4½ per cent. (premium £27), policy 5s., which was duly executed. By memorandum on policy it was declared that insurance was on vessel for £600 currency, and that the premium of £27 and 5s. for policy were paid. The vessel set sail on her intended voyage from St. Mary's for Quebec and Montreal, in Canada, about 12th Sept., with cargo on board, and that during her voyage and on the 1st of October, 1854, vessel, through stress of weather, was forced to anchor at a place called the "Havers," in the river St. Lawrence, and, while there, vessel sprung a leak and became so damaged as to require repairs, to effect which she was taken to Kamaraska, in the St. Lawrence, as also to Quebec and Montreal, where she was safely beached and repaired, which reparation cost £253 11s. 6d. currency.

The second count states that said vessel was at and after the said time when said damages were so repaired in said province, to wit, on the 20th November in said year, in safety and in a seaworthy condition at Montreal; and being so she set sail on her intended voyage from the port of Montreal to the port of

St. John's with a cargo on board ; but that after her departure and before the completion of said voyage, and in the course thereof down the River St. Lawrence, on the 26th November, 1854, while vessel was at anchor in said river during a violent gale of wind, the sea making a heavy breach over her, her star-board chain parted. She thereupon drifted some distance with the larboard anchor, and the pilot and captain, fearing she would be driven on the rocks near Grosse Isle, were obliged to slip from the chain to clear the island. Vessel and crew being in danger, they were endeavouring to run vessel to place of safety when she ran ashore at St. Andre, and was entirely lost to plaintiffs, for which loss plaintiffs claim £600 from defendant, being amount of insurance.

Damages were laid at £1,000. Several witnesses were called by plaintiff to depose to foregoing facts.

Mr. Hoyles for the defence, did not contend against plaintiff's right to recover something. The question was the amount, he expressed dissatisfaction at the conduct of the plaintiffs in not furnishing to the defendants proper accounts and vouchers with other particulars of their claims which they were bound to do. Now the plaintiffs had as it were combined two actions into one, and claimed damage for a partial loss of the vessel when going to Quebec, and for a total loss on her return. The facts of the case are these. The *Clipper* is insured on a voyage from Newfoundland to Quebec, and back to St. John's—in the course of her voyage up she becomes damaged, and goes into port—she is put in dock in Col-de-Sac, and repaired. The captain has no credit there to obtain funds for repairs and by an arrangement between him and Messrs. J. & J. Mitchell, merchants at Montreal, they advance £253 11s., (amount for such repairs) taking a bottomry bond therefor, on the vessel, guaranteed by the captain, and made payable to them within twenty days after vessel's safe arrival in St. John's. Being repaired she set out on her return and coming down the St. Lawrence, another casualty happened, when plaintiff thinks proper to beach vessel—intimation is given to Messrs. J. & J. Mitchell of state of vessel—she is sold for some £350, Messrs. Mitchell & Co. possess themselves of the purchase money, and keep it. With respect to the first claim for a partial loss, Mr Hoyles contended that as plaintiff had no right to seek for loss when they sustained none—but Messrs J. & J. Mitchell, who paid for the repairs of vessel, not plaintiffs, and the money they advanced on

their own risk, on a bottomry of the vessel, which was conditional that the money should be repaid to them, if vessel should arrive safe in St. John's; but vessel did not arrive safe, therefore, they have no claim. Mr. Hoyles objected to sundry items in account for repairs, such as charges for commission, &c.,—their omission to give credit for one-third of repairs, as in the case when new wood is put into old. With regard to the total loss, it will be for the jury to determine if it were a *bona fide* loss, if circumstances justified sale; but at all events defendant should get credit for £350 purchase money of vessel which Messrs. Mitchell possessed themselves of and to which they had no right. A lot of documentary evidence for the defendant was then read, when the Attorney General closed to the jury.

The Chief Justice charged the jury. The plaintiffs who sued as executors of Geran the assured, stood in, precisely the same position as the testator himself if alive. The question was one of considerable importance with regard to the amount, both as regarded the plaintiffs and the insurance company—the defendants.

His Lordship then reviewed the case as proved by the plaintiffs, and charged the jury to direct their attention in the consideration of the evidence before them to the following questions of fact:—Did the evidence, having regard to the damage sustained by the vessel, the situation in which she was lost, the season of the year and the other surrounding circumstances, sustain a case of total loss so as to justify the assured in abandoning to the underwriters. In point of law an *absolute* total loss arose where the vessel ceased to exist in specie, a *constructive* total loss was one where having consideration to the circumstances before mentioned—a prudent man uninsured would in the exercise of a sound discretion sell the vessel on the best terms that could be obtained for her, instead of repairing her. If the jury believed such was the case here the plaintiffs would be entitled to a verdict as for a total loss; if not, then they would view the loss as an average one, and having ascertained the extent of that loss, give a verdict accordingly.

There was in this case no imputation against the master as to the mode of loss, and the substantial question for them to try was whether the loss was a total or an average one.

If a total loss, the damages were to be estimated in the following way: put down £600 currency, amount of the policy, deduct from this the sum (£350) the vessel sold for, and charge the defendants with the difference, viz., £250.

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The plaintiffs further claimed the amount of a bottomry bond given for repairs done in Quebec and Montreal. The defendant contended that the plaintiffs ought not to charge this against them, because they (plaintiffs) have not proved it, and they (defendants) are not responsible for the payment of it. The Court had come to a counter conclusion. There was no reason to suppose that the bond had not been given *bona fide*, and if the expenses were honestly incurred, the plaintiffs would have right to claim them from the underwriters, and it made in effect no difference whether the money were paid out of the proceeds for which the vessel sold or by the money of the assured.

The defendants say that the delay of two months in the sale of the vessel was prejudicial to the defendants, but this would, together with the course pursued by the master, rather suggest to the mind no fraudulent intention on his part.

The bottomry bond was forfeited during the time, because there had been no actual loss of the vessel—she still continued to exist in specie, and might have been arrested by the holders of the bond or the proceeds of the sale attached. The amount paid for repairs the plaintiffs were clearly liable for to the holders, and constituted a fair charge against the underwriters of £252 11s. 6d., less £12 10s. insurance on the bottomry.

The next question to be considered was the charge of £97 18s.—expenses incurred in taking care of the vessel, payment of wages, commission, &c. The master was bound to incur as little expense as possible, and the jury would give what they thought reasonable. The whole sum, less the premium on the bottomry bond, was £606 11s. 10d.; if they found as for a total loss they should make any deduction they thought reasonable from the sum; if, however, they regarded it as an average loss, then these deductions should be made from the amount of the average loss.

Jury then retired. (After which application was made to the Court by Mr. Hoyles with reference to a point of law concerning the bottomry bond, which was reserved by the Court for further hearing). Verdict for the plaintiffs. £606 11s 10d.

On a subsequent day the rule nisi to set aside the verdict and have a new trial, was argued as follows:

This was an action of debt to recover £853 11s. 6d. currency on policy No. 232. The plaintiff's vessel *Clipper* was insured in

defendant's office, on a voyage from Newfoundland to Quebec, and back to St. John's. In the course of her voyage up she became damaged, and put into port and was repaired in Cul de Sac. To procure reparation captain received necessary sum (£253 11s.) from Messrs. J. & L. Mitchell, merchants at Montreal; they taking a security as bottomry bond on the vessel, redeemable within 20 days after vessel's safe arrival at Saint John's. Being so repaired, the vessel set out on her return to St. John's, during which she became damaged, was beached and sold as for a total loss; the holders of the bottomry bond possess themselves of the purchase money (£350) and keep it. At the trial a verdict was given for the plaintiff, £606 11s. 10d.

Mr. Hoyles subsequently obtained a rule nisi to set aside verdict and have a new trial upon the point reserved at the trial, or that the verdict be reduced by the amount of the proceeds of the sale of the *Clipper*, or by one-third of the partial loss. To this rule the Attorney General now shewed cause, and cites in support of his argument *Marshall on Insurance*, 742-3; lien in bottomry bond is on the ship only, and if vessel lost lender loses his money—*Marshall*, 745-6; but if vessel wrecked, lender has a lien on effects of vessel—761; nothing short of total loss will discharge the bond, *i.e.*, the total loss or destruction of the ship; so 2 *Arnold*, 1115. If ship exists in specie, the assured or bottomry cannot recover—1 *Maule & Selwyn*, 30. The lender on bottomry has right to follow ship or effects of sale. As the loss here was a total loss, owners are liable to holders of bottomry bond—if not liable, then they are not bound to remit one-third of repairs on partial loss—*Beneck*, 386; 2 *Arnold*, 983.

Mr. Hoyles, Q.C., contra. Sundry deductions should be made on repairs for partial loss—here when vessel is wrecked notice is given to Messrs. Mitchell, who get possession of the effects of sale, which instead of being appropriated on defendant's account goes to the discharge of what might be termed a private debt. Under the circumstances, Mitchell & Co. had no right to appropriate such proceeds to payment of their debt; they must be regarded as agents of captain and not underwriters, and they were bound to appropriate to defendant's account—2 *Arnold*, 1189. The proceeds are divided generally between lender on bottomry and insurers by French law; no salvage on bottomry contracts by our law. By 19 Geo. II. c. 37, certain holders of bottomry have the benefit of salvage. In this case

legislature have not interfered, and the bond is forfeited by total loss. The borrowers contend that it is a total loss—be it so; they cannot exclude themselves from the operation of the bond; the proceeds must be considered as money in hand of owners to be deducted from whole claim. In the case of partial loss, one-third of the amount expended for repairs must come off on account of the substitution of new wood for old. This rule does not apply where vessel fails to come to owner's possession by default of underwriters, but this case is relieved from the exception, and the general rule prevails.

The Chief Justice delivered the judgment of the Court:—This was an action on a policy of insurance brought by the plaintiffs as the executors of John L. Geran, deceased. The insurance was "from noon of the 12th of September until noon of the 30th of November, upon the body, tackle, &c., of and in the good ship or vessel called *Clipper*, and the said ship," &c., was thereby agreed to be valued at £600 and interest thereon, and also the sum of £253 11s. for money expended in repairs done upon the vessel upon the voyage.

It appeared in evidence that about the 20th of September, 1854, the vessel sailed from St. Mary's, in this Island, for the city of Montreal, Canada; that about the 5th October she encountered a desperate gale in the river St. Lawrence, and the pilot was compelled to beach her at Kamarska, some distance below Quebec; that after some repairs done upon her she was got off and put into Quebec for further repairs, and thence she proceeded to Montreal, where she discharged her cargo; the vessel was then found to be in a very poor condition and required considerable repairs, and Messrs. Mitchell, the consignees of the cargo, having had her thoroughly repaired and made seaworthy again, obtained a bottomry bond for the amount thereof—£253 11s. It further appeared that the master took in his returning cargo, and sailed on his voyage back to this country, and that when about ninety miles below Quebec they encountered another desperate gale, in which she lost both her anchors, and that for the safety of cargo and crew the pilot ran her ashore. A survey was afterwards had upon the vessel, when the surveyors and the master came to the conclusion that it would cost more to repair her than she would be worth when repaired, and that the most prudent course to take was to sell her as she lay ashore for the benefit of all concerned in her. This course was accordingly adopted, and she was

afterwards sold by public auction at Quebec for the sum of £350. The amount of the bottomry bond (£253 11s.) was paid over to the holder of the bond, and the residue remains in the hands of one in the character of a stake-holder, to be paid to the party who shall appear entitled to it when this case has been determined. When the plaintiffs received intelligence of the circumstances they gave notice of abandonment to the underwriters, and claimed the full amount insured as for a constructive total loss.

At the trial the defendants did not resist the right of the plaintiffs to recover some amount, but they submitted they were claiming much more than they were entitled to. They first contended that the loss was not a constructive total loss, but was only a partial loss; that the insured were bound to repair the vessel and not treat the case as one of total loss; and that, therefore, upon this part of the case they were entitled to recover, not the whole £600, but only so much as would have been necessary to repair the vessel. This question of partial or total loss was left to the jury upon the evidence adduced by both parties, and they disposed of it in favour of the plaintiffs by finding that the loss was a constructive total loss, and, consequently, upon this part of the case the plaintiffs were entitled to recover the sum of £600, together with interest thereon, from the date of a written demand for it proved to have been made upon the defendants. The defendants next contended that if the loss were to be regarded as a total loss, the nett proceeds of the sale were their property; and that the application of so much of them as went to discharge the amount of the bottomry bond was unauthorised by them, and should, therefore, be deducted from any amount to which the plaintiffs might be entitled. But when we consider that the amount of that bond was fairly incurred for repairs to the vessel, and that defendants should ultimately have to pay, if not the whole, the greatest part of that amount: that the holder of the bond had a "lien" on the wreck and upon the proceeds of the sale, which was for the benefit of all the parties connected; and that the defendants suffered no injustice from the appropriation, we feel that we ought to sanction it as a fair and legitimate disbursement from the proceeds of the sale. This application of so much of the proceeds of the sale of the vessel, which we hold to be the property of the defendants, for the judgment of the bond for the £253 11s., dis-

poses of any ground of claim on the part of the plaintiffs against the defendants in respect of that sum, and also determines the right of the defendants to receive the residue of such proceeds from the party in whose hands they were placed pending this action. The next deduction which the defendants insisted that they were entitled to make from the claim of the plaintiffs was one-third of the £253 11s., the amount of the repairs done upon the vessel, in conformity with the general rule respecting such an expenditure. In ordinary cases when a vessel has been repaired on her voyage and afterwards returns to the possession of the owner, the latter bears one-third of the amount of the repairs and the underwriters two-thirds, on the principle that the substitution of "new" for "old" materials is a benefit to the ship-owner, who gets the ship the better for the repairs by the substitution of new work for old; but that rule does not apply to a case like the present in which the vessel never reached the possession of the insured after the repairs were done, for she never completed her voyage. The law is thus clearly laid down by Benike, "indeed, one-third is brought to the charge of the ship-owner under a supposition duty, that after the completion of the voyage the ship or the articles replaced will be of so much more value to him, and, therefore, if after the repairs, whether they belonged to general or particular average, the ship be lost in the continuation of her voyage, this subscription fails, and I can see no reason for deducting the one-third in such a case. If the ship do not come to the owner again it can make no difference, in my opinion, whether this was caused by the default of the underwriter or by the subsequent loss of the vessel, for which the underwriter is liable." This statement of the law by an able writer is fully sustained by the principles laid down by the Court of Queen's Bench years ago in *Da Casa v. Newham*, 1 Term R., 407, and which is still the leading case upon the subject.

Upon these grounds we are of opinion that the objections taken to the verdict in this case have not been sustained, and that, therefore, the rule for a new trial must be discharged.

The Attorney General, Mr. Jno. Little and Mr. Carter for plaintiffs.

Mr. Hoyles, Q. C., for defendant.

1857, January. SIR F. BRADY, C. J.

*Practice—Set-off for professional service — Court of Sessions, authority to tax costs in between attorney and client—Delivery of attorney's bill—
Quantum meruit.*

There is no authority in any officer in the Court of Sessions to tax costs as between attorney and client; therefore in an action of assumpsit, where as a defence for the amount claimed the attorney set off his taxed bill, it was held irregular, the proper proceeding being to rely upon a *quantum meruit* for his services.

THIS was an action of assumpsit brought for the recovery of £6 15s, alleged to be due by the defendant to plaintiff. Defence: Set-off of £8 18s. 10d. for professional services. Plaintiff proved his own case, and upon cross-examination denied his ever having retained defendant in cases excepting where defendant had offered his services gratuitously. In the set-off were costs in an action of trover (Duffy v. Towell) which including retaining fee, amounted to £6 13s. 4d. sterling. In this case defendant had acted for plaintiff as his attorney, and the costs taxed by him against plaintiff as between attorney and client amounted to £4 17s. 4d. sterling. Plaintiff's counsel objected to any evidence being given as to charges for professional services in the Court of Sessions—it was purely a counsel fee. The Court ruled that it was competent to charge upon the *quantum meruit*, as for work and labor. It was objected then that no evidence could be allowed as to the £4 17s. 4d. taxed costs—the items thereof had not been served upon plaintiff. On the other side it was contended that two bills had been served, one upon plaintiff and a counterpart upon his attorney, in which the taxed costs were inserted in a lump sum, and that the items had been given to plaintiff's attorney some time after, but no particulars of such service could be given, as it was thought there would be a waiver on the part of plaintiff of technical advantages, and a resort to trial solely upon the merits.

Defendant's witnesses were then called. Defendant was sworn, who proved his being specially retained on several occasions by plaintiff. In the action of trover plaintiff came to his office and retained him, and consulted with him afterwards—he had never agreed to work gratuitously—the charges made were the usual charges of the profession.

Mr Jeans was sworn. He was the sheriff's officer, had served the writ in the action of trover alluded to; was sent by Mr. Hogsett to the plaintiff with the writ; saw Mr. Duffy in the

shop who had sent a clerk to point the defendant in the action out to him.

The roll in the trover case and the docket book were then given in evidence, and proved by Mr. Simms, who also gave evidence as to a brief fee accruing after roll filed, &c. Mr. Lilly spoke as to defendant pleading for plaintiff in the Sessions Court. Mr. Hoyles, Q. C., testified as to the charges being moderate, and the usual charges; he had been employed on the other side in the trover case, and would have charged the same. Mr. Flood spoke as to his belief of the service of the bills, he had not been particular in noting the service, as he was under the impression the case would be tried upon its merits. On rebutter, Mr. Pinsent and Mr. Emerson were sworn, who acknowledged the receipt of the defendant's bill, in which the taxed costs were lumped, but had not seen the items.

The Court, after consideration, decided that the plaintiff have a verdict for £6 15s., without prejudice to the defendant to sue plaintiff for the amount of his set-off after he had complied with the terms of the statute regulating the service, &c., of attorney's bills before suing their clients.

Acting Solicitor General moved for a rule *nisi* for new trial upon the ground that the delivery of defendant's bill to the plaintiff, in an action against attorney, was not necessary to support a set-off. The injustice, too, of the case was apparent that he should pay plaintiff a sum of money when the plaintiff was indebted to him in a larger sum, was it likely that a member of that bar would allow himself to come before that court as defendant in a paltry £6 case unless he was convinced of a good, honest defence,

The Chief Justice delivered the decision of the Court upon the rule *nisi* granted to the defendant for a new trial. That there was no officer in this Court having authority to tax costs as between attorney and client, the former should rely upon the *quantum meruit*. With reference to this action and the judgment of the Court delivered thereupon, as the Court had not gone into the defendant's set-off, leaving that for future investigation. If the counsel for the plaintiff and defendant assented, the Court would again consider the plaintiff's claim and defendant's set-off according to the evidence given at the trial and determine thereof. Both counsel having assented, judgment was given for the plaintiff for £1 1s. 5d. currency.

A. Pinsent for plaintiff.

A. Flood for defendant.

1857, *January*. BY THE COURT.*Practice—Assumpsit—Tender, what is a sufficient, proof of.*

It is a sufficient proof of tender to show that defendant had said to plaintiff "balance was ready for him," that he had it in his pocket at the time, and that the defendant refused to take it.

Assumpsit for £8 15s. for wages from 15th Oct. until 20th Nov. Plaintiff proved that he had entered into defendant's service under agreement for £12 a month, from 12th October until 1st May, 1858, and was wrongfully discharged on the 20th October. He claimed a *quantum meruit* for his services for the time he served, he having in addition to work originally stipulated for, worked a good deal at night. Defendant pleaded general issue, and tender of the balance due as per agreement. Mr. Robinson moved for a non-suit on the ground that the plaintiff could not go beyond his original agreement. Mr. Emerson contended that the original agreement being violated by defendant, plaintiff might claim on a *quantum meruit* for what he had done; and that at all events a balance was acknowledged to be due, the tender of which the plaintiff had denied.

By the Court: Plaintiff must be confined to his original agreement, but defendant must prove his tender.

Defendant was then called, who swore that he had told plaintiff balance was ready for him, that he had it in his pocket at the time, and that the defendant refused to take it. Court held this was a sufficient proof of tender, and gave a verdict for defendant.

Mr. Emerson for plaintiff.

Mr. Robinson, Q. C., for defendant.

1857, *January* BY THE COURT.*Practice.—New trial, grounds for—Jury considering issues other than those submitted to them.*

Where the jury by considering issues other than those submitted to them, showed their verdict to be one of compromise, and in other respects the verdict being contrary to evidence, a new trial was granted on defendant paying the costs of the first trial.

THIS was an action of trespass for causing plaintiff's house to be pulled down during the fire in Tarahan's Town. Damages were laid at £300. The defendant, Colonel Law, was commandant of the troops on that occasion, and it being apprehended the fire would reach across Prescott street and so extend to the eastward of the town, plaintiff's house was, with others, pulled down to form a firebreak. Plaintiff gave evidence, and produced several witnesses.

Defence: That defendant did not give orders to pull down house; that defendant was dining at Government House when the alarm of fire was given, and that when he arrived on the ground this house was being pulled down; that defendant's written instructions to those under his command pointed against the levelling of houses in cases of fire, except by order of His Excellency the Governor or a stipendiary magistrate. Such instructions are as follows:—

ST. JOHN'S, Nfld., 10TH NOV.

(Garrison Order.)

The notice of the Commandant having on occasion of the late fire in St John's been drawn to the numerous applications made to him by the inhabitants under various pretences for military aid either for the purpose of pulling down houses, to withdraw the Barrack engines employed from this or that place to another, or for the assistance of soldiers to remove private property out of the buildings considered in danger, and as such appeals are generally found to originate with self-interested parties, he would caution officers against lending their authority too readily against such demands, unless in cases where the actual preservation of life is involved, and reminds them that in so doing they diminish in proportion the efforts which the garrison as a whole is expected and called upon to make, but which cannot be effective if its strength is frittered away in making isolated efforts on the occasion of such calamities.

The united exertions of the troops should on the contrary be directed to the keeping down of the fire and preventing its extension, if possible, by the judicious placing of barrack engines in such a position as at one and the same time to procure a supply of water and bear upon the fire, or, to form communicating files facing inwards so extended as to cover the intermediate distance between the source of water and the engines, the full buckets being passed up one side, and the empty ones down the other, and also on the application of the "fire hooks" in the pulling down of houses to cause firebreaks, but which must on no account be done unless under authority from the Governor himself, or one or the other of the stipendiary magistrates upon the spot, and to whom application for such authority will in every such instance be made.

ARTHUR QUILL,
Lieut. R. N. Co., Act. Staff Officer.

Defendant gave evidence against the charge of his giving orders to pull down the house, and was strongly corroborated by his orderly, bugler, and other of the troops who were near him on the occasion.

The Chief Justice charged the jury: After reading the evidence for plaintiff and defendant, he directed their attention to two issues, 1st, was defendant on ground when house was pulled down, and was it so pulled down by defendant's orders; 2nd, was house on fire at the time, and would it have been burnt had it not been pulled down. If they find for plaintiff on both issues, then they will assess the damages; and in doing so they must be regulated not by the real abstract value of the property, but by the value to be attached to it at the time, taking into consideration the jeopardy it was in and the perils by which it was surrounded. Verdict for plaintiff—£70 damages.

* * * * *

Attorney General moved for a rule nisi to set aside verdict upon the ground of the same being contrary to evidence. This was an action brought against defendant for ordering a house to be pulled down during Tarrahan's Town fire. To the declaration three pleas had been pleaded, 1st, general issue; 2nd, that a fire had been raging at the time and house was on fire, and would have been burnt had it not been pulled down, and that it was pulled down to save other houses; and 3rd, the

same as the second plea, omitting that the house was on fire. The learned gentleman read then the evidence, and contended at great length that the verdict was decidedly contrary to the weight of evidence. The conduct of the jury in making up their minds upon three issues when they were ordered to retire to consider one, shewed the result was a compromise between conscience and expediency, and was sufficient to warrant a new investigation. Rule *nisi* granted.

* * * * *

Mr. Hoyles shewed cause against a rule *nisi* for a new trial obtained by the Attorney General. The learned counsel contended that the matters submitted to the jury were matters of fact, of which the jury were the sole judges, and their decision ought not to be impugned. The Attorney General supported the rule, and after reading the evidence given at the trial, contended that the verdict ought not to stand, being directly contrary to the weight of evidence. The Court, after consideration, makes the rule absolute upon payment of costs by defendant.

Mr. Hoyles, Q. C., Mr. Whiteway and Mr. Wulbank, for plttf. Attorney General and Acting Solicitor General for defendant.

DEVEREUX v. WISEMAN.

1857, *January*. BY THE COURT.

Practice—Attachment—Money paid into Court—Order for payment out before judgment.

The Court will not, even where security is tendered, order the payment out of money paid into Court by a garnishee under an attachment, before final judgment, even when the motion is supported by an affidavit setting out matters of fraud on the part of the defendant.

MR. FLOOD moved upon affidavit that the money paid into Court by Mr. Mare, garnishee in this cause, be taken out by plaintiff under security. Defendants were supplied for the Labrador fishery by plaintiff to the extent of over £200; they had gone to Labrador in plaintiff's vessel, the *Paragon*, and had at Labrador secretly sold over £73 worth of their catch to one

Mr. Larmour, from whom they received an order upon Mr. Mare for the amount; defendants return in *Paragon* to Harbor Grace, when the fish turned in by defendants was very insufficient to meet plaintiff's account; when plaintiff, hearing of this disposal at Labrador, attaches money in Mr. Mare's hands, which is paid into Court, amounting to £70 12s. 6d.; plaintiff discovers that a quantity of oil is returned to Harbor Grace, in the *Chanticleer*, belonging to defendants, but marked in the name of one Francis Walsh, who is examined under an attachment order, and the oil (£39 worth) ordered to be handed over to sheriff. Plaintiff and his witness, both of whom reside in Harbor Grace, have been in attendance for trial, but owing to the case being low on the docket it had not been tried.

Court—Can the learned counsel cite any authority or precedent for such an application?

Mr. Flood replied he could not; the application for payment out before judgment was novel, but in this case as the affidavit set out matters of fraud on the part of the defendant, and as the plaintiff was in a position to give the best security for repayment of such money if required, he submitted a discretionary power vested in the Court which they could legitimately and with justice exercise herein.

Mr. Little was about to reply when he was stopped by the Court, who said they could not, without some precedent or authority being cited, allow the motion, but would permit a renewal of the application in the February sittings, should any precedent be found.

Mr. Flood and *Mr. Emerson* for plaintiff.

Mr. Little for defendant

1857, *January*. BY THE COURT.

Practice—New trial—Misdirection—Reduction of amount of verdict at suggestion of Court.

In an action brought on a policy of insurance, it appeared the vessel insured had run upon a rock and was subsequently beached. The crew, being unable to resist the plundering of those on shore, sold the vessel at public auction. The jury found a verdict as for a total loss. On a rule *nisi* for a new trial, it was contended there had been a misdirection by the trial judge, in that the evidence was clear that the loss was a partial loss only, and the jury should have been told to confine their considerations to a partial loss only.

The Court, having suggested to the plaintiff's counsel a reduction of the verdict, which was declined, granted a rule for a new trial.

PLAINTIFF'S vessel, *Mary Jane*, on 19th October, 1854, struck on rock when going through Indian Tickle, on her way to Saint John's, where master and crew felt it necessary to beach her, which they did near Seldom-come-by. The plaintiff was on board, but, being sick, chief duty devolved on mate; crew consisted of plaintiff and four hands; upon vessel being beached the residents in and around Seldom-come-by commenced to plunder, notwithstanding the remonstrances of the mate and crew, who, however, were too few to resist forcibly so large a body. The plunderers cut away and destroyed a great part of the hull, rigging, masts, &c. The vessel was, at the instance of plaintiff, surveyed there and ordered to be sold for the benefit of underwriters, which was done, and she was knocked down for £17 10s, which was credited to the company, leaving a balance in dispute of £182 10s. currency. Counsel for plaintiff went for a total loss, but it was in discretion of jury to give verdict for partial loss if evidence warranted them in doing so.

Mr. Hoyles, for defendant, called no witnesses, but contended it was plaintiff's duty to make out for jury a *prima facie* case—they had not done so; their case was colourable, the whole transactions deposed to by witnesses looked very much like fraudulent. The vessel might easily, and with little cost, have been floated off—no necessity for survey or sale. The survey was colourably instituted, and the vessel purchased in by one of the surveyors—besides the plundering, &c., of the ship by third parties, as in this case, were not perils of the seas—were not contingencies which policy covered.

Mr. Justice Emerson charged the jury; they were to consider from the evidence if the loss was a *bona fide* one. The depredations committed upon the hull and material, if the loss

were a *bona fide* one, were perils of the sea for which the assurers were responsible; if the loss was total they should give a verdict for the full amount claimed, the policy was a valued one and was conclusive evidence of value; if the loss were partial they should give a verdict accordingly.

After the jury had retired Mr. Hoyles excepted to the charge, submitting that the injuries committed upon the hull and materials were not perils of the sea. Point reserved.

Jury returned a verdict for plaintiff, £182 10s.

* * * * *

This was an action brought on a policy whereby plaintiff's vessel had been insured in defendant's office. The vessel so insured, in running through a tickle in Seldom-come-by, struck upon a rock, sprung a leak, when crew ran her on shore near that harbor. Some of the inhabitants then commenced to plunder, when the mate, who had control (the master being sick), and others of the crew being unable to resist, called a survey and had her sold, when she was bought in for £19. At the trial a verdict had been given for the plaintiff for total loss. Mr. Hoyles had obtained a rule *nisi* for a new trial upon the ground of misdirection. To this rule Mr. Little now showed cause; and, after reading through the evidence which had been given at the trial, contended that the loss was a *bona fide* loss—the evidence exculpated the defendants as well as the captain and crew from all blame; the beaching, the survey, the sale, and whatever else had been done, all were done with the best intention for the benefit of the underwriters, and, under the circumstances, to the very best advantage.—2 *Arnold*, 818.

Mr. Hoyles, Q. C., contra. The evidence given at the trial could not bear out the direction of Mr. Justice Emerson, who had charged the jury. The points which went to the jury were two: 1st. "Was the loss a *bona fide* loss? If so, the depredations committed by the plunderers were perils of the seas, for which the assurers were responsible, and the jury should give a verdict for full amount claimed. 2nd. If partial loss, they would assess." The learned counsel contended the first point should not have gone to jury, the evidence went to show only a partial loss, if any at all. The vessel was going through a tickle in calm weather and strikes upon a rock, which everybody on board, from their knowledge of the locality, must have known was there, and should and could have avoided. Subsequent events are colourable; a few shillings would have re-

paired the damage, yet the vessel is allowed to be plundered, is surveyed, sold, and bought in by one of the surveyors for the trifling sum of £19, and here she now lies in the harbor worth £300 or £400. The jury should have been directed to confine their consideration as on a partial loss and as to what would have been the cost of repairs to put vessel in good state again. The sale of ship in such cases by master must only be resorted to in cases of extreme necessity.—*Arnold on Insurance, 1475*. Here there was no such necessity, the loss was not total and the vessel should not have been abandoned. C.A.V.

* * * * *

A verdict had been obtained by the plaintiff for £182 10s. The Court had asked the plaintiff's counsel, upon the motion for a new trial, if he would consent to take £100; the Court had to repeat that question. Attorney General, for plaintiff, replied that his client was not disposed to consent to any reduction. The Court then granted the rule for a new trial.

Mr. Little for plaintiff.

Mr. Hoyles, Q. C., for defendant.

WHITEFORD v. McNAMARA.

1857, *January*. HON. SIR F. BRADY, C. J.

Practice—Master and servant—Apprenticeship—Articles—Covenant not to contract marriage within term of apprenticeship—Breach—Action for damages—Demurrer covenant void, being in restraint of marriage.

A covenant in an indenture of apprenticeship binding the apprentice not to contract matrimony within the term is a contract in restraint of matrimony, and is therefore void, being contrary to the public policy of the law.

THE plaintiff sued on indentures of apprenticeship drawn in the usual form. He was a watchmaker. Defendant's son was apprenticed to him. After serving for some time, apprentice married and left plaintiff's service. Defendant (his surety) was sued on her covenant because of the contraction of matrimony by the apprentice, and also for absenting himself and remaining absent from master's service. Defendant took issue on the breach for absence, and demurred to that alleging contraction of matrimony.

Mr. Robinson contended that this covenant was in restraint of marriage and therefore illegal—it was both within the spirit and letter of the law annulling contracts in restraint of marriage. It did not come within the exception because there was nothing reasonable or prudential in it, nothing necessary to the due protection of the master's rights. On the contrary, such a contract was contrary to good morals and public policy, and instead of being detrimental, the marriage of the apprentice would be eminently advantageous to the master. The same principle applied to this (and in a stronger degree) that applied to contracts in restraint of trade, it was illegal when it ceased to be necessary for the security of the master. This was oppressive; there was nothing on the face of the pleadings to show that the protection of the plaintiff's rights required it.

Mr. Hoyles, Q. C, contra: Contracts in general restraint of marriage were illegal, but the qualification of that rule sustained this case, all the cases cited went to show this, they were in general or perpetual restraint, but the qualification was recognised by the dicta of all the judges. The law allows such a contract when reasonable, politic or necessary for the security of rights of the master. The reasons were very sufficient here; what more reasonable than that an apprentice and a minor should be so restrained, otherwise his time and attention would be used in support of his family instead of his master's business; he had no means of livelihood otherwise, he was dependent on his master for support, he had not the prudence which age possessed to enable him to form a correct judgment in such matters; public policy demanded it, for his family might be thrown for support on the public—he was bound to live with his master and observe certain hours. The question had never been raised in a like case before, all the books of precedent and every indenture contained the covenant.

Mr. Robinson: His learned friend argued from hypothesis. There was nothing before the Court directly or from implication that the apprentice was a minor, or had no means, &c. The covenant had arisen from statutory provisions affecting the Poor Laws which were either repealed or did not apply. The Court took time to consider.

The Chief Justice: This was an action brought by the plaintiff against the defendant for breach of a covenant contained in an indenture of apprenticeship. The declaration contained only one count which stated that on the 24th March, 1854, by a certain indenture of apprenticeship, the defendant

did put and place one Joseph McNamara, her son, apprentice to the plaintiff to learn the art, trade and mystery of watch-maker. It was thereby covenanted and agreed that "the said apprentice his said master faithfully should serve, &c ; that he should not waste his said master's goods, nor lend them unlawfully to any, *nor contract matrimony within the said term, &c., &c*" To as much of that count as relied upon the covenant against contracting matrimony, the defendant demurred, and assigned the following causes of special demurrer. "That is to say, that the covenant of the defendant that the said Jos. McNamara should not, during the term in the said indenture mentioned, contract matrimony, was and is illegal and void, being in restraint of marriage, and such parts of the said declaration are in other respects uncertain, informal, insufficient, &c."

The law upon this subject is very clear, and the only difficulty is its application to each particular case. There cannot be any doubt that the effect of the covenant in this case is to restrain Joseph McNamara from contracting marriage for five years from the date of the indenture of apprenticeship. The law says that "all contracts made in restraint of marriage are void, as contrary to the public policy of the law." (Addison on contracts, 671; and in Chitty on contracts, 522, the law is thus stated: "A contract, the object or effect of which is to restrain or prevent a party from marrying any person, is void" The covenant in this case falls precisely within the rule just stated, for it is in restraint of marriage, not with any person in particular, but with any person whatever, and is therefore, by the general rule of law, void. It was contended, however, by Mr. Hoyles, that an exception existed to that general rule if it could be shewn in the particular instance that the restraint was prudent and proper; but conceding that the law does recognize that exception to the general rule, I have nothing in this case from which I can say that the restraint was prudent and proper beyond the fact that the party restrained was an apprentice. For anything that appears upon the pleadings in this case, at which alone I can look, the apprentice may have been at full age at the time of the execution of the indenture of apprenticeship, or on any day after its execution and prior to his alleged marriage; and therefore I could not hold the restraint prudent or proper in this case, unless I was prepared to lay down as a general rule of law that in point of law it was a prudent and proper restraint to prevent, as far as

it could be done, by bond or other security, every male and female apprentice from contracting marriage, a position which, in my judgment, could not be sustained in law. The case of *Hartley v. Rice*, 10 *Frost*, 22, cited by Mr. Robinson, rules this case, and I feel bound to hold that the covenant in this case falls within the general rule, and that being a contract in restraint of marriage generally, it is void, and therefore the demurrer must be allowed.

Mr. Hoyles, Q. C., for plaintiff.

Mr. Robinson. Q. C., for defendant

ROACH v. HICKEY.

1857, *January*. HON. SIR F. BRADY, C. J.

Practice — Arrest and malicious prosecution — Action for — Charge of felony—Demurrer.

In an action for malicious prosecution for laying a charge of felony before a magistrate, and having plaintiff imprisoned, the defendant demurred to the declaration, admitting all its counts to be true.

Held—The demurrer must be overruled.

(Action on the case for malicious prosecution.)

THE first count alleged that defendant had maliciously charged the plaintiff with having feloniously stolen a certain casting net of the defendant, and proceeds to describe the issuing of the justice's warrant, arrest, examination, acquittal, and discharge.

The second count similar, except that the charge was "having and feloniously receiving into his possession."

The third count alleged that the defendant maliciously charged the plaintiff with "having in his possession a casting net which had been stolen from defendant," upon which charge he procured a warrant to be issued, &c.

The defendant demurred to the declaration.

Mr. Pinsent supported the demurrer. The demurrer had been much more extensive, but several of the objections had been amended by the plaintiff, and the following remained:

1, the charge is not alleged to have been on oath—*Morgan v. Hughes*, 2 T. R., 225 ; *Caudle v. Seymour*, 1 G. and D., 454. 2, the justice is said to have acquitted and discharged—he could not acquit of a felony—acquitted without qualifying words means after trial by jury. The form in 2 *Chitty*, 413, *in notis* should have been followed.—*Morgan v. Hughes*, *ante* ; *Combe v. Capron*, 1 M. & R., 398 ; 1, *Saunders*, 229. 3. to the second count particularly no charge imputing a crime to the plaintiff is alleged to have been made by the defendant, therefore a warrant could not legally issue, the justice ceased to act as a magistrate when he had no jurisdiction, the action (if any could be sustained) should be trespass. *Leigh v. Webb*, 3 *Espinasse*, 165 ; *Cowper*, 682.

Mr. Robinson against the demurrer. There were no substantial grounds for the demurrer. As to the first objection, the word *charged* was sufficient, because it is presumed that everything was regular ; indeed there was no necessity for a charge upon oath. 2, *C. & P.*, 424. As to the second objection, the word acquitted is used in the forms. The objection in *Morgan v. Hughes*, 2, J. R., was that it was not used, the defendant is also void in the declaration to have abandoned the charge. As to the third objection, the fact of maliciously setting in motion without jurisdiction is sufficient to sustain the action as against the party setting in motion.—*Goslin v. Wilson*, 2, *Wilson*, 302.

The Court took time to consider.

The Chief Justice : This was an action on the case in the nature of an action for a malicious prosecution for laying a charge of felony before a magistrate, in consequence of which the plaintiff was taken into custody and imprisoned for some time. The declaration contained three counts to which the defendant filed a general demurrer to the whole declaration, and assigned causes of special demurrer to two of the counts. Each of the counts states that the defendant went before a Justice of the Peace and charged the plaintiff, 1st, that he was falsely and maliciously ; 2nd, without reasonable or probable cause ; 3rd, with criminal offence, upon which, under a warrant from such justice, the plaintiff was arrested and imprisoned ; 4th, that that proceeding was abandoned and at an end. These are the necessary and proper averments to sustain an action of this kind ; and the demurrer which admits all these allegations in the declaration to be true is on that ground without foundation. The cases which Mr. Pinsent, for the defendant, relied

on, have no application to this case; some of them were actions against magistrates for illegal acts done by them under color of their office in which very different forms of pleading prevail; and the others are cases at *nisi prius*, where questions of variance between the evidence and the allegations in the declaration arose and were determined, but in none of them did the point decided arise upon demurrer, which admits the facts stated in the declaration, and which in this case admits the four averments which are alone required to sustain this action. Let the demurrer be overruled.

Mr. Robinson for plaintiff.

Mr. Pinsent for defendant.

KEATING v. McBRIDE ET AL.

1857, *January*. HON. SIR F. BRADY, C. J.

Shipping—Freight—Usage of trade to carry goods free, where freight was paid on return cargo.

Where the plaintiff claimed freight on goods from St. John's to Twillingate, from which port he was to bring back a cargo of fish at one shilling per quintal, the defence set up was the usage and custom of the trade to carry such goods free; the Court left it to the jury to say whether there was a custom or usage as would exempt the defendant from payment of freight.

THIS was an action of assumpsit brought to recover £14 4s. for the freight of certain goods. The plaintiff's case was that the defendants hired the plaintiff's vessel to go to Twillingate and bring from thence a cargo of fish at one shilling per quintal freight; plaintiff agreeing also to take to Twillingate, free of freight, a quantity of goods, about enough to ballast the vessel, provided he had no delay. Instead of this the vessel was loaded with 70 barrels flour, 60 bags bread, 8 barrels pork, five tubs butter, two chests tea, two puncheons molasses, &c. On his arrival at Twillingate there was no fish ready—Byrne the planter employed the plaintiff for ten days collecting and paid him for it, but he was delayed a fortnight longer; plaintiff therefore demanded freight for so much of the goods as were sufficient to ballast the vessel, because she was delayed, and also for what was over and above sufficient for that purpose, as he

had agreed to take freight for only such quantity. The plaintiff was called to sustain his own case.

Mr. Hoyles, for the defendants, contended that it was the custom and usage of trade to take all the goods required. As to the delay, it was only the delay usual on such voyages, the rate of freight was so calculated as to meet it. The plaintiff was dealt handsomely with in having been paid by Byrne for collecting. The witnesses to the contract would tell the Court that there was nothing about putting on board only sufficient goods to ballast, or about paying freight in case of delay—it was a mistake of the plaintiff. It would be for the jury to say if there was unnecessary delay and if payment of freight was contingent on that. Mr. Hoyles then called witnesses for defence.

The Chief Justice charged the jury. As a general rule the service should be paid for; the jury would say whether there was a usage which exempted the payment of freight in this instance, and if so, to what extent. No damage could be given for delay in this action, but it would be for the jury to say whether, if the payment of freight was contingent on delay, if there was any in this instance.

Verdict for the plaintiff for five pounds.

Mr. Whiteway for plaintiff.

Mr. Hoyles, Q. C., for defendant.

EAGAN v. BRENNAN.

1857. BY THE COURT.

Party wall—Attaching to gable of adjoining proprietor.

When the defendant makes any substantial use of the plaintiff's wall he is liable for the value of the same.

ACTION of assumpsit to recover part cost of party wall. Plaintiff's case The defendant built a house in Water-street to the extreme extent of his boundary, coming home to plaintiff's house, of whose gable defendant availed. Before building defendant had requested and obtained permission to use plaintiff's gable in building his house, and negotiations had taken place between

the parties, but they had not come on terms. Defendant proceeded to build, and completed his house—building no eastern gable of brick but coming home to the plaintiff's wall. Plaintiff was refused any compensation by the defendant. He now sought to recover half the original cost of his gable £64 10s., for although he had offered to take £45 in view of an amicable settlement of differences, he did not consider himself bound by that offer, when driven to seek for his rights at law. Plaintiff called the mason who built the wall—Mr. Coyle, defendant's superintendent, and gave evidence himself.

Defence.—The defendant had a right to build to his extreme boundary as Eagan, the plaintiff, had done, and the greatest care had been taken not to use or in any way invade plaintiff's wall as his (defendant's) offer had been accepted. Defendant relied on Mr. Coyle's evidence; he proved that defendant had built up his wall of lath and plaister on beams and stringers with uprights on his own land irrespective of plaintiff's wall, and that the only connection was where the roofs were plastered where they joined. Plaintiff and his witnesses evidence was then taken.

The Court directed the jury in case they were of opinion that the defendant had made any substantial use of the plaintiff's wall, to find a verdict for the plaintiff accordingly, if on the other hand he had gone to his extreme boundary without making such substantial use, to find a verdict for defendant. Verdict for plaintiff £25.

Mr. Robinson, Q. C., for plaintiff.

Mr. Little for defendant.

1857, *January*. HON. SIR F. BRADY, C. J.

Practice—Witnesses, exclusion from Court during hearing of case—How far rule applies to parties to suit.

Parties to suits are not debarred from being present in Court during the hearing of their suits.

TROVER for two hundred and fifty seal-pelts, valued at £280.

After the jury had been sworn Mr. Hoyles moved for the exclusion from the court of all the witnesses in the cause. Mr. Robinson: Is this to extend to my client? Mr. Hoyles: Certainly, if he is to be a witness.

Mr. Robinson would bring under the notice of the Court the hardship of excluding his client; the inconvenience to him (Mr. R.) in not having his client at hand to consult with throughout the case. By our local Act (14th and 15th Vic) parties were allowed to become witnesses in their own cases; before this Act parties had a constitutional and a legal right to be present in court at the trial of their causes, provided they behaved with propriety; and would the court construe that the privileges conferred upon parties by the Act could be availed of only upon their abandoning their antecedent privileges? In England the authorities upon this subject were conflicting, and Mr. R. would read to the court the latest authorities *pro* and *con*.

In Carrington's reports, vol. 3, *Newman vs. Achilli*, "Before any evidence was adduced Wilkins, Serjt., for the defendant, asked that the witnesses on both sides might be ordered out of Court.

Thesiger, A. G.—Is this intended to include Dr. Achilli?

Wilkins, Serjt.—Most assuredly.

Lord Campbell, C. J.—If you insist upon it of course it must be so.

Thesiger, A. G.—To send the prosecutor out of court because he happens to be a witness is extremely inconvenient, as it prevents his personal communication with his counsel in the progress of the case.

Lord Campbell, C. J.—If the counsel for the defendant insists on it it must be so.

Wilkins, Serjt.—We feel it our duty to press it

Lord Campbell, C. J.—Then Dr. Achilli must leave the court.

Mr. Stephens (one of the special jury).—It seems hard upon Dr. Achilli to exclude him, as he cannot know what charges are brought against him.

Lord Chief Justice.—Gentlemen, as prosecutor he has a right to be in court, but as it is also proposed to examine him as a witness, and as all witnesses are ordered out of court, if the other side insist, I am bound to include him in the order.

Dr. Achilli left the court."

The date of the above decision is June 21, 1852. After this decision a difference of opinion arose among the judges on the matter.

In May 12, 1852, a contrary decision was given by Mr. Justice Talford, which Mr. Robinson would read verbatim from the *Reports, 3 Carr.*

Before Talford, J., *Charnock vs. Bewings and others*. In this cause Byles, Serjt., for the plaintiff, required the witnesses on both sides to leave the court, including the defendants themselves.

Edwin James for the defendants, objected to their being sent out, they were present in obedience to a writ of summons, and the Court had no authority to order them to quit.

Boyles, Serjt., submitted that the chief justice of the Court always acted upon the principle that he had authority, although it was true that the Chief Justice of the Queen's Bench held the contrary.

Talford, J., held that on constitutional grounds he had no authority to order defendants to leave the Court as long as they behaved with propriety.

The marginal note to their decision is, "Parties to an action cannot be ordered out of Courts as long as they behave with propriety."

Mr. Robinson argued at great length, contending against the exclusion of his client from Court.

Mr. Hoyles: If you avail yourself of the privileges conferred by the statute and place your client as a witness, he must be considered as a witness, and treated as such, and subject to all the disabilities of a witness. Lord Chief Justice Campbell was a high authority, and his opinion should have great weight.

The judges retired, and returned in half an hour, when the Chief Justice pronounced the decision of the Court. A rule is about being established which will regulate the future proceedings of the Court. His lordship referred to the vast importance of the question, should parties to suits intending to be witnesses therein be excluded from Court, if required. how conflicting were the opinions of the highest authorities in Great

Britain upon the matter which was not there even yet definitely settled. His lordship regretted the question had come so unexpectedly before them, without entering into the reasons which influenced their minds; and the decision of the Court was that parties ought not to be debarred from being present at the trial of their cases, leaving Mr. Hoyles to take exception hereafter to the decision, and re-open the same for further and more prepared argument.

The case then proceeded. The plaintiff was owner of the *Diana* at the ice last spring. Some of the crew late in the spring killed some 250 seal pelts, but being distant from their vessel, were unable to secure them on board that day. They piled them upon a pan of ice, marked them, but upon returning next day found the seals gone and the defendant's vessel (*Walrus*) close at hand. The plaintiff brought a great many witnesses to prove to above facts, and that defendant's crew had taken and appropriated plaintiff's seals.

The defence was a simple denial of defendant's vessel having taken seals, to support which over ten witnesses were examined.

The Chief Justice charged the jury to be careful in their investigation of this case, as it concerned the staple trade of the country. He was sure their minds were impressed with an anxious desire to arrive at an honest conclusion. He thanked them for the attention they had given to the case for the last two days, and remarked upon the ability and zeal displayed by the counsel. The case for their consideration resolved itself into two matters of fact; 1st, were they satisfied the crew of the *Diana* (plaintiff's vessel) killed and piled these seals at the ice. Of this there was little doubt, as the crew of the *Diana* swore to the fact and it was not denied by defendant. The second and important point was, "did any of the crew of the *Walrus* (the defendant's vessel) take these seals?"

His lordship would remark that all the witnesses produced both on one side and the other, were more or less interested, but it would be for the jury to say what amount of credibility should be attached to each and all of them. Verdict for the plaintiff for £110 10s. 2d. currency.

Mr. Hoyles, Q. C., for plaintiffs.

Mr. Robinson, Q. C., for defendants.

1857, *January*. BY THE COURT.

Master and servant—Fishery agreement—Mutuality—Agreement signed only by servant—Enticing away and harboring—Entering into service.

In an action for enticing away a servant from his master's service and harboring him it is no defence that the agreement entered into between the servant and the master was signed only by the former, or that the servant had not actually entered into the service of the master and performed any work.

THE case had been tried in the Northern Circuit Court at Harbor Grace. The declaration contained two counts.—First—for enticing away the plaintiff's servant. Second—for harboring after notice. Plea—General issue. Evidence: John Fisher proved the servant (Hinds) signing usual agreement (produced) to serve plaintiffs at fishery last season for £26 wages. Witness was in the office of Messrs. Punton and Munn when one of the plaintiffs and the servant came in and requested witness to draw up the said agreement or shipping paper, which he did, and read it over to servant in presence of plaintiff. The servant then signed it. Michael Fitzgerald (plaintiff) deposed to having shipped and agreed with Hinds and then proceeded to the office to get agreement; also proved the damage sustained. John Fitzgerald proves the same, and giving notice to defendant, and the then admission of the defendant, of his knowledge of Hinds being plaintiff's servant, and that he wanted a man and would keep him at all risks. There was further evidence of damage and of Hinds being in defendant's service.

The Acting Solicitor General had moved for a nonsuit on the grounds given below. The points were reserved. He then addressed the jury but called no witness. Verdict for plaintiff £25. Defendant afterwards obtained a rule *nisi* for setting aside the verdict and entering a nonsuit on the points reserved. The rule was made returnable into the Supreme Court. The following were the points:—"That the agreement produced and given in evidence at the trial on the part of the plaintiff, purporting to be between the said plaintiff and John Hinds, is void for want of mutuality, not having been signed by the said plaintiff, and that the said John Hinds, not having actually entered into the service of the said plaintiff or done work for him. Mr. Pinsent now shewed cause to the rule. After reviewing the pleadings and evidence in the case, &c., he submitted that as the agreement was not one required to be in writing by the Statute of Frauds, the recognition and adoption

of it by the plaintiff could be supplied, as it had fully been in this case, by parol; and was proceeding when he was stopped by the Court, who said they were with the learned counsel on this point of the rule, and desired to hear him on the second.

Mr. Pinsent then proceeded with the second point, and cited *Blake vs Lanyon*, 6 Term Reports, 221; *Lumly vs. Gye*, 2 Ellis and Blackburn, 216.

Mr. Hogsett contra. In this case the plaintiff agreed to ship one John Hinds—a shipping paper was drawn up, purporting to be between Hinds and plaintiff, but signed only by Hinds, there being no mutuality, the law will not recognize such a paper—there is no entry into service. Upon what then does plaintiff rely as to the foundation of his action? upon the paper purporting to be an agreement which he gave in evidence at the trial, but that paper is a nullity, for want of signature of servant, therefore the action must fail. The learned counsel argued at great length, and cited *Chitty on Pleading*, 1 vol. 302, 3 Term Reports, 148, 658; 9 Ad. & Ellis, 959; 6 Barn & Cross, 255; 9 Barn. & Crea., 659; 2 Step. Com. 109.

The Court must discharge the rule for a nonsuit, with costs.

Mr. Pinsent and Mr. A. Emerson for plaintiff.

Acting Solicitor General, Mr. Flood and Mr. Hogsett for defendant.

1857, *January*. BY THE COURT.

Shipping—Bills of Exchange—Notice of dishonor—Effect of notice of dishonor, when plaintiff sues on the common counts—Practice—Rule nisi—New trial.

The Plaintiff sold in Placentia a quantity of fish to defendant taking in payment an order on a firm in St. John's, where on presentation the same was dishonored, the drawees having no effects. The plaintiff sued on the common counts, treating the bill of exchange as a nullity and relying on the original contract. At the hearing no evidence of notice of dishonor was given. On a motion for a rule nisi to set aside verdict,

Held—There was no necessity for notice in such a case, as between the original parties to the bill.

THE plaintiff had obtained a verdict for £39 3s. in an action of assumpsit for goods sold and delivered, and money lent, being the consideration for which two inland bills of exchange had been given and dishonored, and which had been produced by the plaintiff on his cross-examination on trial, but no proof of notice of dishonor had been given. The plaintiff relied on the common counts. The defendant obtained a rule nisi to set aside verdict and enter a nonsuit upon the point reserved at the trial, viz., that there was no evidence of notice of dishonor of the bills of exchange or orders given by the defendant to the plaintiff.

Acting Solicitor General, for plaintiff, now shewed cause—contending that there was no necessity for notice of dishonor, that the principal only applied (if applied at all) when the plaintiff declared exclusively on the bills, where the transaction was between indorsers and indorsees, and not between the immediate parties, and urged the hardship and injustice of compelling a party to go through such an ordeal; here the plaintiff, a poor man, had sold a quantity of fish to defendant in Placentia, for which he received an order upon St. John's; he had travelled ninety miles, and upon his arrival the bills drawn upon Messrs. Job Brothers & LeMessurier were dishonored. The drawees had no effects; it was therefore competent for plaintiff to treat the bills as a nullity and rely upon the original contract. In support of his argument, the Acting Solicitor General cited *Chitty on Bills*, 582, 577; *Chitty on Contracts*, 779; 6 *Dun and East*, p. 52; *Packworth vs. Maxwell*, 7 *Taunton* 312; *Hickey vs. Harding*, 7 *Dun and East*. 64.

Mr. Pinsent for the defendant, contra, contended that the law of bills of exchange for strong reasons required notice of dishonor to be given, with a very few exceptional cases (within which this did not come) as proof of want of effects, &c., and

urged the reasons for such a proceeding, being for the purpose of enabling the drawer to withdraw his effects from the drawee or prevent any on their way from coming into his hands, also to afford him an opportunity of paying the amount of the bills for which he had a day after receiving notice, &c ; that the law was the same whether the action was on the bills or their consideration ; and cited from *Chitty on Bills* ; *Chitty on Contracts* ; *Bridge vs. Berry*, 3 Taunton, 130 ; *Dennice vs. Morrice*, 3 Espinass 158 ; *Rucker vs. Hilder*, 16 East, 43 ; *Nicholson vs. Gouthitt*, 2 H. Blackstone, 609 ; *Cambridge vs. Allembry*, 9 Dowling and Ryland, 391 ; *Kemble vs. Miles*, 1 Hanning and Granger, 757.

The Court held that there was no necessity for notice in this case—that the law relied upon by the defendant did not apply as between the original parties to a bill in an action upon the consideration. The rule must therefore be discharged with costs.

Acting Solicitor General and *Mr. Flood* for plaintiff.

Mr. Pinsent and *Mr. Keough* for defendant.

THOMAS ET AL. v. MARINE INSURANCE CO.

1857, *January*. BY THE COURT.

*Evidence—Admissibility of parol evidence to explain meaning of terms of contract—
Policy of insurance—Term in policy “wood cutting voyage.”*

Where a policy of insurance contained an exception that the ship was not covered if lost *when engaged on a wood cutting voyage*, the Court refused to allow parol evidence to be given in explanation of the word *wood*.

The vessel had been lost on her return from a port where she had gone to cut some spars, and it was contended that the word *wood* in the exceptional clause in the policy meant *firewood*.

ASSUMPSIT on policy for £247 10s. The schooner *Mary Ann* was lost last fall behind Twillingate when running up to Her-ring Neck ; one Elias Warren was master ; she was insured in defendants' office under a time policy from 20th June to last of December ; she was running through the Tickle under heavy wind and dense fog ; the danger was discovered, but vessel missed stays and ran down upon the land ; crew escaped in boats. The value of vessel was £500, was half insured (£250),

and, deducting from the latter sum half the price of a main-sail which plaintiff had recovered and sold for £5, would bring their present claim to £247 10s. currency. The policy, among the exceptions not covered by the insured, contained the following words, "*or when engaged on a wood cutting voyage*"; the vessel was returning from Salt Harbor when she was lost, where she had gone to procure stocks, &c., to cut into sheathing for the vessel. The counsel for the plaintiff urged that the terms of the exception alluded to referred solely to "*fire-wood cutting voyage*," and would be construed by them as such; boards, spars, &c., are wood, but if a cargo of these were in port the jury would not designate such a cargo of *wood*, but a cargo of boards or spars, or whatever it may be; all have distinctive meanings according to the universal acceptance of the term; especially in this country *wood* means *fire-wood*, the word here has a conventional meaning and is applied only to fire-wood, the same as *fish* means *codfish* only. Now, salmon, trout, mackerel, are fish, yet it has, after mature deliberation, been decided in our Supreme Court that the term *fish* means *codfish* alone—the cases are simply analogous. The peculiar avocations of our people render it necessary to give such terms distinctive meanings. The object of the underwriters in reserving the exception alluded to was to prevent vessels insured going to such places as Cape St. Francis or Belle Isle for fire-wood, where the crew, as in such cases is the custom, would abandon the vessel for a time, and, after cutting the wood, shoot it down over the cliffs—in such places there is no harbor, but Salt Harbor, where the *Mary Ann* went to, was as safe as the harbor of St. John's; moreover, when vessel was lost she was not "*on a wood-cutting voyage*," she was at sea returning from Salt Harbor. A policy of insurance is a contract for indemnity and must be construed liberally.

Mr. Robinson then proceeded to examine his witnesses, and was examining as to the meaning of the word "*wood*," &c., when Mr. Hoyles objected to any evidence tending to explain a written document.

The counsel on both sides argued at length.

Chief Justice expressed the opinion of the court that evidence cannot be given explanatory of the policy, and suggested a verdict by consent, leaving the question of the meaning of the policy to the court.

Verdict for defendant, subject to the opinion of the court upon the matters of law.

On a subsequent day the following argument took place on the motion for a rule nisi to set aside verdict :

This was an action brought on a policy by which plaintiff's vessel was insured in the office of defendant, from certain ports and on certain voyages mentioned in the policy. By such policy defendant undertook to remunerate plaintiff for loss or damage of said vessel on all such voyages "*except on a wood-cutting voyage.*" The vessel was lost on her return from a harbor, where she had gone to cut some spars, &c. At the trial Mr. Robinson contended that the term "wood" in the exceptional clause meant "fire-wood" only, while Mr. Hoyles argued that it extended to "all" wood.

The Court directed the jury to find a verdict for the defendant, leaving Mr. Robinson to move thereafter for a new trial. Mr. Robinson subsequently obtained a rule *nisi* to set aside the verdict and obtain a new trial upon the ground that evidence ought to have been allowed in explanation of the term "wood," which had been disallowed by the Court at the trial. To this rule Mr. Hoyles now shewed cause, contending at great length that plaintiff should be bound by the terms of the policy which were self explanatory, and the rule of law would not allow any evidence in explanation thereof. The term "wood" was not a doubtful term, there is a condition in the policy limiting the liability of the underwriters, the terms of such condition were not susceptible of more meanings than one, and the Court were acting in accordance with the rules of evidence when they rejected parol testimony in explanation of such terms.

Mr. Robinson, Q. C., contra. Where local usage gives a term or word different meanings, evidence is allowed to shew what signification should be given to the term or terms in question. In this country the word "wood" is considered as meaning fire-wood alone, just as "fish" means codfish. In the case where this Court decided, after great deliberation, that the term "fish" meant in common acceptation codfish only, evidence had been let in to shew what meaning by local usage was assigned to the term fish; the cases are analagous. In a case of *O'Dwyer v. McLea*, explanation of the word "gallon" was allowed as to whether it meant by usage of the trade here, old or new. So in *Winter v. Roe*, the word "sterling" was explained by evidence whether it meant local sterling or imperial sterling. The learned counsel cited *Noble v. Kennaway Douglas, 492, Park, 45.*

The usage for one year is good so long as it was understood by parties. The antiquity of usage not essential—2, *Stark on Evidence*. Parol evidence is admissible to explain doubtful terms.—2, *Starkie*, 559. Generality of description may be confined to a single object by parol evidence,—*Robertson v. French*, 4, *East.*, 130; *Baker v. Payne*, 1, *Vessey*, 159. Local terms and expressions ought to be explained by parol.—4, *Taun.*, 856. Deviation vitiates policy, but intention to deviate will not. Here the learned counsel contended there was no deviation, and supposing there was an intention to deviate it was not carried into effect. C. A. V.

On a subsequent day the following judgment was delivered by the Court :

Looking at the whole of the memorandum, and taking the term "wood-cutting voyage" in connection with the context, and having regard to the perils insured against, the place and the period of the year, we are clearly of opinion, and all the judges who have heard the case do not entertain a shadow of a doubt, that parol evidence should not have been received, and that the rule for setting aside the nonsuit and for a new trial must therefore be discharged.

Mr. Robinson, Q. C., for plaintiff.

Mr. Hoyles, Q. C., for defendant.

1857, January. HON. MR JUSTICE DES BARRES.

Fishery—Shareman at Seal fishery—Liability of owner of vessel for sealer's share of seals.

In an action against the owner of a sealing ship, by a stowaway, who was adopted during the voyage as one of the crew by the acceptance of his work, for the value of his share of seals, it is no defence that the owner has only received the vessel's share of the seals, and that the crew's share has never come into his custody.

THIS was an action of *assumpsit*, and was brought by John Dunn against James McLoughlan, to recover the sum of £37 5s 5d, for wages, services, and share of seals on board the brigantine *Wyoming*, belonging to defendant, on her last sealing voyage to the ice.

The plaintiff is an indentured apprentice; the defendant a master mariner, and prosecuted the seal fishery last season. On the 4th March last the plaintiff "stole away" in the *Wyoming* then about to proceed to the ice, and having on board a crew of forty-seven men and two boys. A few days after leaving port the captain (Kelly) told the plaintiff to keep the vessel pumped out for his diet, and do nothing else. The plaintiff continued to make himself otherwise useful on board until the 14th March, when the vessel struck the seals. On the evening of that day, the skipper sent him to assist in hoisting on board some seals that had been brought alongside by the crew, telling him to get himself ready to go out hauling on the following morning. He was accordingly supplied with a pair of boots, a knife, a pair of cuffs, a gaff, and a tow rope by the master of the watch, McLoughlan, (nephew of the defendant) at the order of the captain. Dunn went out as commanded, at day-break on the ensuing day. Coming on board with his second tow of seals he lost his knife, but had another given him as before by Kelly, who told him that he had now the price of 100 knives earned and that though he came out a passenger, he would bring him home a man. He hauled on board 72 seals for his own hand. A day or two before coming into port, McLoughlan brought plaintiff into the cabin, entered in a book his name and the several articles he had given him and gave him to understand he should be regarded as one of crew. The number of seals brought in in the *Wyoming* was 5,084; one half belonging to the crew the other to the ship or owner, and bought by Hounsell & Co. for £3,715 9s. 10d., or at 35s. per quintal. From this a deduction of £137 7s. 0d.

was made for the boys' shares, leaving a balance of £3,578 2s. 10d. to be divided equally among 47 men. A second division was subsequently made by the "tallyman" for the crew on being told there were 48 shares instead of 47, as originally divided upon. The "tallyman" always gets the number of shares from the captain, as the authorised agent of the owner. No share was allotted for the plaintiff, though "before we came in and afterwards, deposed one of the crew, "every man on board was willing Dunn should get *half his hand*, for he was a good boy and earned it well." On applying at the office of Hounsell & Co. for the payment of his share, plaintiff was refused until the consent of the defendant was obtained. The defendant denied his liability in the case, as having received but the vessel's share of seals, and bade him look to the crew's half and not to him for his wages. On this the action was brought.

The learned counsel for defendant contended that the plaintiff had sued the wrong party, and that insufficient evidence had been adduced to make his client legally responsible to pay for seals that never came into his custody.

The Court overruled the objection reserving the pleas.

The jury handed in a verdict for plaintiff, £26 5s. with the rise until 20th May.

Mr. Little for plaintiff.

Mr. Robinson for defendant.

WHITE v. McBRIDE.

1857, *January*. BY THE COURT.

Trover—Seal pellets—Reducing into possession—Practice—Rule nisi—Verdict contrary to evidence—New trial.

Where the evidence shewed that the plaintiff had killed a certain quantity of seals and that the same had been taken, and that defendant's vessel was the only one in the neighborhood to take the same, and the jury found for the plaintiff; the Court refused to grant a rule to set aside the verdict.

THIS was an action of trover brought by plaintiff against defendant for the recovery of the value of over three hundred

seals. The crew of plaintiff's vessel killed a large number of seals at the ice last spring, but being unable at the time to take them on board their vessel, left them where they were shot until an opportunity offered for their removal. Plaintiff called several witnesses, who proved the locality, the seals killed there by White's crew, and no vessel near at the time to kill them but White's, and no vessel near to take them but defendant's.

Mr. Hoyles, for the defendant, applied for nonsuit, upon the ground that there had been given no clear proof that plaintiff had ever been in possession of seals or had any property therein.

Mr. Robinson contra.

The Court would reserve the point.

Mr. Hoyles then goes to the jury and states that their defence is not that the plaintiff did not kill the seals in question, but they (the defendants) did not take them.

Several witnesses were called on behalf of the defendants; after which His Lordship the Chief Justice charged the jury at length. Verdict for the defendant.

On a subsequent day an argument took place on an application for a rule nisi to set aside verdict as contrary to evidence:

This was an action of trover brought to recover the value of over three hundred old seals killed by the crew of plaintiff's vessel at the ice last spring and alleged to have been taken and appropriated by defendant. Upon trial a verdict had been given for the defendant—Mr. Robinson now applied for rule nisi to set aside verdict as being contrary to evidence; Mr. Hoyles, Q. C., opposed; both counsel arguing at length. Rule refused.

Mr. Robinson for plaintiff.

Mr. Hoyles for defendant.

1857, *January*. BY THE COURT.

Practice—New trial, grounds for—Discovery of evidence, since trial which would have led to a different result.

A new trial under no circumstances will be granted on account of evidence not having been given at trial which was in the power of the party applying, to give.

MR. ROBINSON applied for rule *nisi* to set aside verdict which had been given for the plaintiff, upon the ground that since trial evidence had been discovered which would have induced a verdict for defendant, had it been put in at trial.

Court: *It is a settled rule that a new trial will, under no circumstances, be granted on account of evidence not having been given at trial, which was in the power of the party applying, to give.* Rule refused.

Mr. Carter for plaintiff.

Mr. Robinson for defendant.

MORRISON v. HOGAN.

1857, *January*. HON. SIR F. BRADY, C. J.

Costs—Commission to examine witness abroad—Liability of unsuccessful party to pay costs of commission, when witness has returned, previous to trial.

When a commission to take evidence abroad is taken out *bona fide*, the Court will allow the costs of same to the successful party notwithstanding that the witness has returned previous to the trial and that the evidence so taken abroad has not therefore been used at the trial.

THE CHIEF JUSTICE: This was an application on behalf of the defendant for an order on the Registrar of the Court to review his taxation of the defendants costs, he having obtained a verdict. The defendant complained that he was disallowed the costs incurred by him under a commission he issued to examine a witness residing in the United States, out of the jurisdiction of this Court. The ground upon which the costs of this commission were disallowed was that the depositions taken thereunder were not used, at the trial of this cause, the witness having in the meantime returned within the jurisdiction of the

Court. Mr. Robinson on behalf of the plaintiff cited two cases in support of this position, that where depositions are so taken and not afterwards used at the trial, for what reason it did not matter, the party who obtained the commission should bear the expense of it. These cases were *Bridgest vs. Fisher*, 1, *Ring*, N. C., 510, and *Curling vs. Roberston*, 7, *Mang and Gr.*, but they do not at all establish that proposition, and they are quite unlike the present case. In *Bridges vs. Fisher*, Tindal, C. J., said "the question where the burden shall fall must ultimately depend upon the peculiar circumstances of each case," and acting upon that principle as the true ground upon which our decision should rest, and finding that this commission was obtained *bona fide* to protect the defendant from an unfounded and unjust demand that the evidence taken under it would have been forthcoming and available, if the cause had been tried at the sittings of the Court next after that evidence was so taken, and that it was not used at the trial in the ensuing term, solely because the party had accidentally returned and was within the jurisdiction of the Court, and the law then required his personal examination, we are clearly of opinion that in the sound exercise of the discretion rested in us we are bound to declare the defendant entitled to the costs of the commission in this case.

Mr. Robinson, Q. C., for plaintiff.

Mr. Hoyles, Q. C., for defendant.

LAKEMAN v. GOODRIDGE.

1857, *January*. BY THE COURT.

Master and servant—Fishery servant—What class of work servant is bound to do—What is a reasonable request.

It is a reasonable request to ask a fishery servant who is shipped "as a hand in a boat, or anything else in his power for the good of the voyage," to go as a hand in a boat with provisions to the scene of a wreck; his refusal to obey will justify his dismissal.

ACTION for wages as a guarantee; judgment of the Court delivered by the Chief Justice.

In this action, which is an action to recover wages to shipping paper entered into, and under which the plaintiff claims,

is as follows: "St. John's, Newfoundland, 12th June, 1850. It is hereby agreed between John McPherson, of Renewa, and Thomas Lakeman, that he shall serve the said John McPherson, or order, from the date hereof until the 20th day of October, in the capacity of a hand in a boat, or manufactory of cod liver oil, or anything else in his power for the good of the voyage or his said master's interest, as he shall from time to time be ordered; and in consideration of his services being in all respects well and duly performed without any hindrance or neglect, according to the true interest and meaning of this agreement and the custom of the fishery, he is to have as wages seventeen pounds currency. John McPherson. Allan Goodridge will hold himself liable for the above wages being duly paid."

It appears that the plaintiff entered into the service of McPherson under that agreement, and remained there until the first day of August, at which time a vessel was wrecked near Renewa. That the defendant being about to send provisions for the relief of the passengers on board the wreck and to bring them to Renewa, McPherson asked plaintiff to go as a hand in the boat, which he refused to do. That McPherson reasoned with plaintiff and told him he was wrong; but plaintiff still refused to go. That McPherson then told defendant of plaintiff's refusal, upon which defendant requested the plaintiff to go, when he again refused to go. Defendant then dismissed him.

The question we have to decide is, was that a proper dismissal, which depends upon the question whether the request was a reasonable one or not. We are all of opinion that under the agreement it was a reasonable request, and that there was no justification for the plaintiff's refusal, and that therefore the defendant was justified in turning him away. Judgment for the defendant.

F. B. T. Carter for plaintiff.

H. W. Hoyles, Acting Sol. Gen'l, for defendant.

1858, *January*. BRADY, C. J.; DESBARRES, J.; EMERSON, J.

Will—Inofficious character of—Importunity—Act of making Will not originating with Testator—Coercion—Undue influence.

In order that a will may be regarded as inofficious, that is not consonant with the natural affections and moral duties, it must be shown that the parties affected by the acts of the testator in this respect, were near relatives of his, for whom he was morally bound to provide; but even where a child is left unprovided for it does not render the will void but merely requires stricter proof of the capacity of the testator.

It is no part of the testamentary law of England or of this country that the making of a will must originate with the testator, nor is it required that proof should be given of the commencement of such a transaction provided it be proved that the deceased completely understood, adapted and sanctioned the disposition proposed to him and that the instrument itself embodied such disposition.

THIS case came before the Court on the application of the Right Rev. John Thomas Mullock and the Hon. John Kent, claiming to be the executors of the last will and testament of Patrick Doyle, deceased, and praying that probate of that will might be granted to them as such executors, which application was resisted on behalf of several parties claiming, as the nearest of kin of deceased, to have that will set aside as void on several grounds.

It appeared from the evidence that Mr. Doyle was in the enjoyment of his ordinary health up to and on Friday the 29th May, on which day he had attended as usual to his duties as one of the Stipendiary Magistrates of St. John's. On Saturday he was taken ill and was unable to leave his house. It further appeared that on Sunday evening, Dr. Mullock mentioned to the Rev. Father O'Donnell that Mr. Doyle was very ill, that he thought he would not recover, and that it would be well he arranged his temporal affairs; that in consequence of this communication Father O'Donnell saw Mr. Doyle next morning, and asked him "if his temporal affairs were settled; he said not, and I said better they were; he said, if I were up it would be better, and I agreed with him but said it might be done as he was. He was then satisfied to make his will, and said he was sorry the Attorney General was not at home, as he would have him to make his will. The Attorney General was then absent in England. I then suggested the names of other professional gentlemen, the names of Mr. Hogsett and others, and then the name of Mr. John Little (the brother of the Attorney General)

and he said he believed John Little was an honest man, and he would have him. I told Mr. Doyle I would go for Mr. Little, and he said "Yes," "and I went for him." I have abstracted *verbatim* from my notes this portion of Father O'Donnell's evidence as bearing directly upon one of the questions in this cause. Father O'Donnell went for Mr. Little and brought him to Mr. Doyle's house some time about one o'clock, and when they went there, Miss Ward told Father O'Donnell that Mr. Doyle expressed a desire to see Mr. Kent, and I went up to Mr. Doyle and asked him if he wished that Mr. Kent should be sent for, and he said "Yes." Mr. Kent was accordingly sent for and came in a few minutes, and he, the witness, Mr. Little and Mr. Kent then went to Mr. Doyle's bed-room to settle the will. On this part of the case the evidence of Mr. Little is of importance. In his direct examination he stated that "after some short conversation with Mr. Doyle the object of our visit was opened to him, and as a preliminary step to the drawing of his will, I enquired what his property consisted of, and he stated that he had some in Water street, some at the back of the Old Chapel, his moveable property, effects and monies in Bank. He then stated how the will was to be made." In his cross examination upon this part of the case, Mr. Little stated that after they went into Mr. Doyle's bed-room I was the first to broach the subject to Mr. Doyle. I said I came to make or draw up his will. At first Mr. Doyle delayed for a couple of minutes; I repeated the question, and in this delay either Mr. Kent or Father O'Donnell made some remarks as I did; both may have made some remarks. I suggested the propriety of his making his will, and he wished to defer it until he was stronger, I repeated what I said as to the propriety of his making his will, and asked him the particulars of his property, and he then gave the particulars "meaning those he before spoke of." Mr. Little then stated that he took down from the lips of Mr. Doyle the following memorandum in pencil:—

"Land in Water-street and about Old Chapel in St. John's, moveable property, household furniture, monies, &c.

The Right Rev. Dr. Mullock, for the use of the

Catholic Church in this Diocese...	...	£ 400	0	0
John Kent ... ..	...	1000	0	0
Mrs Archibald Kerr ... ..	...	300	0	0
Mrs. Kenny ... ..	...	300	0	0
Mrs. Firth and family ... ..	...	150	0	0

Misses Power of Halifax	...	...	...	£15	0	0
a year as long as they live						
Mrs. Howley for the use of self and children	.			250	0	0
Miss Ward	...	...	...	200	0	0
Ellen Nowlan	...	...	...	150	0	0
Rev. Jeremiah O'Donnell	...	...	...	100	0	0
Mary Foley,	}	...	...	Stg.	100	0
Widow Cummins,						
For Masses, the sum of	...	...	...	200	0	0
Catholic Orphanage and Sisters of Mercy	..			50	0	0
For the Benevolent Irish Society	...	...	...	100	0	0
For the Poor of St. John's	...	...	...	200	0	0
Patrick Doyle Kent	...	...	...	100	0	0
Mrs. John Kent	...	...	...	150	0	0

The residue to be paid to Mr. John Kent and
Dr. Mullock, share and share alike"

Mr. Little further stated that after this memorandum was made, Mr. Kent made a calculation and said the property was somewhat about £8,000, and then several of the above legacies were increased by the direction, or at the instance of Mr. Doyle, by the addition of the sum of £100 to each. Mr. Little then stated that he took the instructions down stairs, and from them drew up the will, and that in some time after, the will being prepared, they returned to Mr. Doyle's room and in the presence of Father O'Donnell and Mr. Kent, Mr. Little read it over paragraph by paragraph to Mr. Doyle, who assented to it, and he then having been put sitting up in his bed, signed the will in two places, on the 4th page of the first sheet of paper, and on the 3rd page of the second sheet, in the presence of Father O'Donnell, and of Messrs. Kent, Hanrahan and Little, and declared it to be his last will and testament. Messrs. Little and Hanrahan then signed it as attesting witnesses. Mr. Little states "the will was then folded up by me, and from Mr. Doyle's directions or at his instance, I made a copy of the will and sent it to the address of Mr. Doyle the same afternoon. I was instructed by Mr. Doyle to send the original will to Dr. Mullock, which I did that evening. Mr. Doyle lived from that day, being the 1st June, until the morning of the 4th, when he died." This is a brief outline of the circumstances under which it was proved that the will was executed.

On the part of those who resist the grant of probate, several grounds have been relied on to defeat the will: some of these

grounds rested mainly upon the evidence elicited in cross-examination from the witnesses in support of the will, from the evidence of the legatees—Mrs. Kenny, first cousin of the deceased; Mrs. French, first cousin also; Mrs. Firth, second cousin; Mrs. Howley, first cousin of the wife of deceased; Mrs. Kerr, first cousin of the deceased, and Ellen Nowlan—all of whom are legatees, and were present when the will was read in Mr. Little's office, after the death of Mr. Doyle. They all state they then heard a legacy read from the will of £500 to Robert Kent, which does not appear on the face of the will, but if they be correct in this statement, it merely shows that Mr. Little made a mistake without any motive or object that we can discover, and none has been suggested at the Bar; or it arose from some misapprehension on the part of one or more of those present, and thus became a subject of conversation amongst them; but in either or any point of view that evidence cannot have any effect upon the questions in the cause. Mrs. Kenney stated that deceased in his lifetime allowed her £20 a year, and he made a similar allowance to Mrs. Firth, and they all deposed to his having led them to expect more from him when he died. Mrs. Kerr in particular stated that she was on the most affectionate terms with deceased; that he dined frequently at her husband's house, made her a present of an expensive gold chain, spoke frequently of her son, John Kerr, and on one occasion said, "John, my boy, this will be your chronometer"; and she also stated that in every way he led her to think she would be generously and liberally remembered by him. She further stated that she was at the house of the testator on Monday and saw Father O'Donnell. "I asked him what he was doing, and he said, making the will; and I said, was it right to do so in the absence of all his relations. He said, he (the testator) was bound to have his temporal affairs settled, as he had his senses. I said, he is very sick and not fit to make his will; and Father O'Donnell said, he should leave his property to those who would do good with it. I then went into the bedroom, and deceased was very weak and lethargic." Mrs. Kerr further deposed to the great extent of Mr. Doyle's deafness.

This is an outline of the evidence of the witnesses against the will, with the exception of the evidence of Thos. Aylward, who was a first cousin to the deceased, and to whom no legacy was left, and the whole of what he proved was that when Mr. Doyle met him in the street he would shake hands with him and say to him, work away, Tom, there will be plenty for you

bye-and-by. Mr. Robinson, on behalf of Mr. Aylward, first contended that this will was void, as being what is called in law an inofficious will—that is, a will “not consistent with the natural affections and moral duties,” because it passed over his client, Mr. Aylward, without making any provision for him; but that rule applies only to the nearest relations of the deceased, for whom the testator is morally bound to provide, and not to one so remote from him as Mr. Aylward; and even if a child were left unprovided for, it does not render the will void, but merely requires stricter proof of the capacity of the deceased and of the instructions for the will.

The next ground for impeaching this will was, that it was made under “importunity.” In first *Williams on Executors*, 41, that ground of objection is thus defined, “Importunity, in its correct legal acceptation, must be in such a degree as to take away from the testator free agency; it must be such importunity as he is too weak to resist; such as will render the act no longer the act of the deceased; not the free act of a capable testator, in order to invalidate the instrument.” And again, in page 42, note (v), “It is no part of the testamentary law of this country that the making a will *must originate* with the testator; nor is it required that proof should be given of the commencement of such a transaction, provided it be proved that the deceased completely understood, adopted and sanctioned the disposition proposed to him, and that the instrument itself embodied such disposition.”—By Sir J. Nicholl in *Constable v. Taffnell*, 477, affirmed on appeal 3 *Knapp*, 122.

It is a fair question here, does the present case fall within the first or second of these well-established rules? On the morning of the third day of the deceased's last illness, his clergyman who had known him for thirteen years, waits upon him and he states, “I asked him if his temporal affairs were settled; he said not; and I said it were better if they were, and he said it were better if he were up, and I agreed with him, but said it might be done as he was, and he was then satisfied to make his will and expressed his regret that he could not have the Attorney General to make it, as he was absent from the country.” Looking at this evidence and the evidence of Mr. Little on the same subject, can it be regarded as shewing that more was done than recommending one, who it was believed would not recover, to settle his affairs by making his will; an interference to an extent consistently exercised from the best and purest and kindest of motives, and which, if not exercised, would leave thou-

sands who really desired to make their wills to die intestate, for they would postpone until too late the making of their wills; and if such interference were held to vitiate such instruments, half the testaments in the British dominions would be rendered void. Mr. Doyle manifestly never intended to die intestate—upon the whole of the evidence, including that given by the legatees, it is clear that he always contemplated making his will. When he was spoken to about making it, he said it would be better when he was up and when he was stronger, but those around him believed, as death in three or four days after proved, that neither of these events would occur. He then expressed regret at the absence from the country of the Attorney General, but he selected his brother, Mr. John Little, in these remarkable words, "He said he believed John Little was an honest man, and he would have him." There is nothing therefore, in my judgment, in this part of the case to impeach the will, or throw any serious imputation upon the conduct of the persons connected with the making of it.

This brings me to the main ground upon which the will in question has been impeached, and that is, that the testator made this will not as a free and voluntary act and disposition, but under the coercion of undue influence exercised over him, and which induced him to make the disposition of his property which he has made—that is, that some person or persons, by fraud and circumvention for their own purposes, contrived to obtain such a dominion over the deceased that in the disposal of his property by his will, so far from being a free agent, he was a mere instrument in his or their hands. Let us consider and examine the grounds upon which this grave charge, this serious imputation rests, and ask ourselves against whom it is directed, and when was that influence acquired and unduly exercised? The learned counsel who conducted the case of those who opposed the will with so much ability and so much zeal, have not directly charged any individual, or individuals, as the party or parties who exercised this influence; nor have they pointed to any particular period when this influence was obtained and exercised, save in one instance by Mr. Robinson, to which I shall presently advert.

As respects the time when it was or could be exercised, there is not an individual who heard the evidence in this case that must not feel that this will, if made on Friday instead of Monday, could not be called in question on the ground of the mental or physical incapacity of Mr. Doyle; and if on that day he

passed over every name mentioned in his will and bequeathed the whole of his property to sustain an object so interesting as one recently proposed, "an asylum for the aged, infirm and disabled fishermen," who could question his right to do so, or suggest a ground upon which such a disposition of his property could be impeached?

If that be so, and I am of opinion that it cannot be questioned, the period within which "undue influence" could have been exercised is reduced to the interval between Friday and Monday, when he made his will. The question then arises, who exercised this influence within that time? No one is named, but it is idle to conceal the fact that either or both Dr. Mullock and Mr. Kent is or are the party or parties accused. With respect to the former, the evidence does not connect him with this transaction from the beginning to the end of it, beyond his stating to Father O'Donnell that the deceased was seriously ill, and that it would be well that his temporal affairs were settled. With respect to the other, Mr. Kent, it does not appear from the evidence that he was aware of the illness of Mr. Doyle, that he even saw him from Friday until Monday: that he saw him on that day not as one volunteering advice or controlling the will or the actions of the deceased, but only when sent for at the express desire of the testator, as the only individual whom he expressed a desire to be present before he made and executed his will. But it was urged by Mr. Robinson that nothing could be more calculated to unduly influence the mind of the testator than that he, being on his bed of sickness, from which as events proved he was not to rise again, than the presence of Father O'Donnell, Mr. John Little and Mr. Kent, an argument which I own I heard with surprise when I consider who these parties were—one his clergyman, who had known the testator for over thirteen years; another, one who, with his brother, had been his professional adviser for several years; and the third, an individual who appeared from the evidence to have lived upon terms of the closest intimacy with the testator for several years before his decease. If the presence of parties so connected with a testator, as the three individuals I have referred to were proved to have been with Mr. Doyle, were held to be sufficient to raise an argument or an inference that such presence amounted to an exercise of "undue influence" over the mind of a testator, I declare I do not know what one in his last illness is to do but, in making his will, reject all those whom natural feeling would suggest as

some of those who should be around him at such a time, and send into the highways for persons whom he never saw or knew before!

The remaining ground upon which the will in this case has been impeached, is that while the testator has thereby only given to his relatives legacies of small amount, he has left the bulk of his fortune between two individuals whom it is argued were not relatives, but comparatively strangers to him. Now undoubtedly that is a fair ground for requiring from the Court the most rigid examination of the evidence by which the will is supported, and the closest scrutiny into the circumstances under which it was executed, and I shall now therefore briefly notice that evidence. Every witness produced, the Rev. Father O'Donnell, the Hon. Dr. Rochfort, the Hon. Edmund Hanrahan, and Messrs. Graham, Little, and Lilly, all concurred in representing the testator as being in his life-time a man remarkable for shrewdness, sound judgment, and great particularity and accuracy in the management of his pecuniary affairs; and here I cannot avoid remarking how that evidence was sustained by the production of his account-book, and the entries therein to almost the day of his illness; and also how his recollection, at the moment he was giving instructions for his will, of some of these entries, proved that at that time he had a sound and disposing mind, memory, and understanding, and was able to discern the objects of his bounty. All these witnesses also gave powerful evidence as to the perfect capacity of the testator to make his will at the time he did so, with the exception of Mr. Lilly, who, it did not appear, had seen him during his illness. Dr. Rochfort, amongst other matters stated, that "he had known the testator for over thirty years, and was his medical attendant; that he attended him in his last illness two or three times every day, and that his mind was not affected during that illness. I saw no difference in that respect in him; I think he was competent to make his will. On Wednesday evening he was perfectly conscious and shook hands with me; in fact, I saw no mental incapacity about him to his death. I said to Father O'Donnell on Monday that Mr. Doyle's temporal affairs ought to be settled—his debility was not such as to prevent his resisting influences attempted to be exercised over him." Mr. Graham, who was with the testator when he died, and frequently throughout his illness, Mr. Hanrahan, who is one of the witnesses to the will, and saw the testator sign his name to it in two places, and heard him declare it to be his last will, stated

that "he (the testator) appeared to me then to be quite sane and sensible—he knew me and spoke to me, and complained of oppression on his chest." Mr. Little stated that, "at that time Mr. Doyle was of sound mind, memory, and understanding. He was then as shrewd and intelligent as I ever knew him to be—there is not a word in the will produced that was not read over to Mr. Doyle, and I am perfectly satisfied he heard every thing I said, and understood it. There was no influence whatever exercised on Mr. Doyle to induce him to make the bequests, on the contrary, caution was taken not to do so." Father O'Donnell stated that he had known the deceased for over thirteen years, and spoke of his shrewdness and intelligence. He said "the will was then brought up and read to Mr. Doyle and to his hearing in the presence of myself and of Messrs. Kent and Little. Mr. Doyle approved of it when it was read. I am perfectly satisfied he understood the will, and he then executed it. He was of sound mind, memory and understanding then, and was at that time as sound and sensible as he had been for six months before, in my belief, he perfectly heard and comprehended the will." Upon this evidence, coming from the lips of witnesses of intelligence, thoroughly competent to speak upon the matters they deposed to, wholly, I may say, disinterested, and whose veracity has not been impeached or questioned. in my judgment, the Court is bound to accede to accede to the application of the executors, and grant to them probate of the will in question in this cause.

My brother judges will express their own views upon this case, while they desire me to state their concurrence in the opinion I have expressed, that probate of the will should be granted to the executors, and that the costs of those who resisted the grant of probate should be paid out of the assets of the deceased.

MR. JUSTICE DESBARRES entirely concurred with the Chief Justice as to the validity of the will and the disposing power of the testator. There was no merit in the case for the impugnants. The testator had had a copy of the will sent to him and retained it until his death, a period of two or three days, during which he was not proved to have been otherwise than in perfect possession of his senses. He (Justice DesBarres) was glad that the proceedings had taken place for the satisfaction of all parties, as reports had gone abroad. The cases had

now been satisfactorily settled, and the costs were well expended out of the estate.

MR JUSTICE EMERSON: The will of the late Patrick Doyle, Esquire, has been brought before this court as a case of contestation, and its validity put in issue upon two alleged grounds, viz, incapacity and influence. The cause came on for hearing on the first of February last, and it appeared in evidence that on the 4th June, 1857, the said Patrick Doyle died, possessed of a large amount of property, and that on the 1st day of June, four days previous, he made and executed his last will and testament, in which, after bequeathing to several legatees respectively various sums of money, he directed that the Right Rev. Dr. Mullock and John Kent should take all the remaining portion of his estate, to be divided equally between them, thus constituting them by law residuary legatees. No question has been raised as to the formal execution of the will, nor has any effort been made to impeach the integrity of the subscribing witnesses thereto

The witnesses to a will are called upon not only to attest the due execution of the same, but likewise the capacity of the testator at the time of its execution—4 *B. E. L.*, 70; and if such witnesses remain unimpeached, from what other source satisfactorily can a court receive information to assist its judgment?

The alleged incapacity of the testator necessarily raises the enquiry: Was he at the time he made his will of sound disposing mind and memory? for it is the integrity of the mind at that time that is now at issue.

In the *Marquis of Winchester's* case, referred to in 4 *B. E. L.*, 49, Lord Coke says "that it is not sufficient that the testator be of memory when he makes his testament to answer familiar and useful questions, but he ought to have a disposing memory, so as to be able to make a disposition of his property with reason and understanding, and that is such a memory as the law calls sane or sound and perfect memory."

This doctrine appears to be fully recognised in the case of *Marsh vs. Tyrrell*, 2 *Hag.*, 122, and in *Ingram vs. Wyatt*, 1 *Hag.*, 401, and also by Mr. Justice Erskine in delivering the opinion of the Judicial Committee of the Privy Council in the case of *Harwood vs. Baker*, reported in 3 *Moore's, P. C.* cases.

Was the testator, therefore, when he made his will, under the dominion of that reason which the law requires?

There are three attesting witnesses to this will, and all unite to establish the capacity of the testator at the time he made it. The evidence of the Rev. Father O'Donnell is important, as he was the first to visit the testator in his chamber of sickness a few brief hours preceding the execution of the will. In the exercise of his office the witness recommended the testator to arrange his worldly affairs; to this the testator, after a little hesitation, expressed regret at the absence from this country of the Attorney General; the names of other professional gentlemen were then mentioned, when the testator said, "I think that Mr John Little is an honest man," and, at the testator's request, the witness went for Mr. Little. Here, then, in the commencement is evidence to some extent of the testator's reasoning capability, he had intellect to comprehend and discriminate, and volition to guide his selection; and the same witness says it was at the express desire of the testator that Mr. Kent was sent for. It is not necessary that I should advert to all the specific portions of the Rev. Father O'Donnell's testimony, but I may briefly say, that after a rigid examination of several hours, the evidence that the testator was of unimpaired intellect when he made his will; that it was read to him distinctly; that he perfectly understood its contents, and that being understood by him and assented to, he signed and executed it as his last will and testament, remained undisturbed, and these statements are corroborated and sustained by the testimony of Mr. Haurahan and Mr. Little, gentlemen of unquestioned honor, and also distinctly sworn to by Dr. Rochford, a gentlemen of professional integrity and high position, who had for a period of thirty years and upwards been the medical attendant and personal friend of the deceased, and had attended him on the day on which the will was executed and up to the period of his death, that to this time, to use the witnesses own expression, he could observe no mental incapacity about him. Assisted by the evidence of the Rev. Father O'Donnell and the other attesting witnesses, I turn for a moment to the will itself, which purports to bequeath to a number of persons respectively, (all save one or two) claiming kindred with the deceased, specific legacies. If the evidence is to be relied on, the whole of these legacies, save one or two, were named by the testator to the professional gentleman who received from him his instructions for making his will, and that such instructions were the volition of the testator, uninfluenced by any one; but there is one significant fact that when the gross amount of all the legacies was ascertained, the

testator added to very many of them a further sum, thus increasing the amount of those bequests which he originally intended for the objects of his regard. All these circumstances incontestably manifest the presence and exercise of reason and disposing capacity, every one of the legacies named by the testator formed a subject for him of distinct and separate contemplation, each one was separate and apart, peculiar to the object in view, and each object engaged a separate process of reasoning; and thus, in my mind, so far as the evidence goes in sustinment of the will, the question of incapacity is disposed of.

To support the objections to the validity of the will, several witnesses have been examined, some of them legatees; and others who, whilst they urge their relationship to the testator, complain that they have not been made the recipients of his bounty, whilst a large proportion of his estate has passed into the hands of those who are not his kindred; and thus it is argued that the testator could not have been of sound and disposing mind and memory, but subject to some improper influence which for a time affected his capacity and interrupted his reasoning capabilities. If this were true, it would be as susceptible of confirmation as any other fact; the burthen of proving this, however, falls on those who make the allegation, and it would be for them to establish such an impediment—*Swin*, 77.

Now, the only influence which the law recognises as sufficient to invalidate a testament, implies restraint or duress, whereby for a time the mind loses its legal capacity; earnest persuasion and entreaty are not alone sufficient, for whilst in the one case force and coercion are presumed, the other leaves untouched that *liberum animum testandi*, essential in the perfection of a will. If then, in the first place, the disposing capacity of the testator has been satisfactorily made out, it necessarily follows that the question of influence is also set at rest.

Mrs. Kerr, together with other legatees, have severally testified to certain remarks and observations made by the testator to them at different times, which appear to have excited their expectations and induced a belief that the testator would, out of his ample property, more largely provide for them. Mr. Alward, another witness, and a near kinsman of the deceased, deposes to observations and remarks also made by the deceased to him, having as he thought a similar tendency. One may lament the disappointments to which others may be unhappily exposed; reason and authority, however, admit that little regard ought in many cases to be had to the expressions of a testator made

either before or after the making of his will, because, possibly, these expressions might be used by him on purpose to conceal or disguise what he was doing, or for other secret motives or inducements which cannot after his death be found out.—*2 B. A., 310.* Courts cannot reach these secret motives and inducements, and every man capable of making a will is free to appropriate as he pleases the fruits of his industrious accumulation.

I am of opinion that at the time the testator made his will the reasonable and thinking portion of his being exercised its legitimate dominion, and consequently that he was of sound disposing mind and memory.

Mr. Robinson said he understood from what Mr. Justice DesBarres had said, that the costs were to come out of the estate.

By the Court.—That was the opinion of the Court; it regarded the case as a very legitimate one for the next of kin to sift to the bottom, and the parties supporting the will ought to be satisfied for the sake of their own vindication.

The Attorney General asks to be allowed to oppose, contending that the circumstances were not of that special character to warrant the imposing of costs on the estate.—*Waddilove, 139, 3; Phil. 434, 4 Hag. 3; Hag. 7, 93.* The proceeding was vexatious.

By the Court.—There was nothing to affect the mind of the Judges that the proceedings were vexatious. The matter had been fairly met in the outset. Costs must be allowed out of the estate.

For the promovents: *Attorney General* and *Mr. John Little.*

For the impugnents: *Mr. Robinson, Q. C., Mr. Hoyles, Q. C., and Mr. Carter.*

1858, *January*. HON. MR. JUSTICE EMERSON.

Practice—Arrest—Irregularity of process—Setting aside—Petitioner for insolvency, how far protected from arrest on the grounds of being a suitor.

On an application for an order to discharge from the custody of the sheriff certain parties who had been arrested on a *capias ad respondendum* whilst on their way home from the Court where they had been in attendance on the hearing of their insolvency,

Held—The defendants had the same privilege from arrest whilst in attendance at the Court at the hearing of their insolvency as if an ordinary suitor or witness.

MR. CARTER, for the defendants, applied to Mr. Justice Emerson for an order for the discharge from the custody of the sheriff of the defendants in this case, upon the ground that at the time of their arrest by the sheriff upon a *capias ad respondendum*, issued by the plaintiff, they were on their return to their homes from attendance before the Central Circuit Court, where they had just previously been on an adjournment of their examination touching their insolvency.

Mr. Carter contended that the defendants had the same privilege from arrest under these circumstances as a suitor or witness. The hearing of the insolvency initiated before the Chief Justice had been, on motion of the applicants, adjourned by his order to the Central Circuit Court that day.

Mr. Pinsent, for the plaintiff, contra, contended that the attendance of the defendants was a voluntary one—they had applied upon a petition which was *ex parte* proceeding, and could be prosecuted or abandoned by the applicants at pleasure. The order of the Chief Justice, upon which the defendants relied for their privilege, was not compulsory upon the defendants, and was made upon their own motion. No person was entitled to the privilege unless attending by the compulsory process of a competent jurisdiction or amenable to it. The petition was to a judge in chambers, and he had no power to order the hearing of it by the Court, nor had he the powers or privileges of a Court. The privilege claimed was that of the Court, and not of the party, and might be exercised at discretion. The proceedings were under 19th Vic., cap. 14; they might be adopted as the fraudulent means of enabling parties to show themselves in public; and cited from Archbold's *Practice—Hare v. Hyde*, 16, 2 B., 394; *Cameron v. Lightfoot*, 2, W. Blackstone, 1190; *Baldwin v. Cawthorne*, 9 Vessey, 166; *Salkeld*, 544.

Mr. Justice Emerson held that the provisions of the law gave the defendants a right to adopt the proceedings by petition, and implied that the same privileges in this respect attached to the tribunal authorised to adjudicate, and the parties privileged to proceed before it as if it were a Court in the strict sense of the word, and that in this case the parties were attending by virtue of an order which he could not disturb before the Central Circuit Court. His lordship must grant the order for the discharge from custody.

Mr. Carter: Upon entering a common appearance.

Mr. Pinsent: The order must be general, the plaintiff was not precluded from arresting after the temporary privilege had ceased.—*1, G. & D, 158.*

General rule ordered.

Mr. Pinsent for plaintiff.

Mr. Carter for defendant.

THOMAS ET AL v. TASKER AND BRUCE.

1858, *January.* HON. SIR F. BRADY, C. J.

Insolvency—Assignment to two creditors previous to insolvency—How far assignees are trustees for other creditors—Undue preference to creditors.

Where a debtor assigns his stock in trade and effects by an absolute conveyance to two of his creditors, there is no foundation for asking the court to engraft upon a deed, which is in its express terms a grant for the benefit of two individuals, an equity which would compel them to share that benefit amongst all the creditors of their debtor, it being admitted that the assignment was not made with the fraudulent intention of giving undue preference to creditors.

THE bill in this case was filed by the plaintiffs being some of the creditors of James Scott Rutherford, lately carrying on business as grocer, &c., in St. John's, against the two defendants for the purpose of getting distribution amongst the creditors generally of stock assigned by Rutherford to the defendants by deed, and taken and realized by them. The defendants had put in an answer to which there was the general replication. The evidence of Mr. J. S. Rutherford was read on the part of the complainants to the effect that he had given a deed of assignment of his stock in trade to the defendant on the 5th February, 1854, ante-dated to the 5th January prece-

ding. That although the deed purported to be an absolute assignment to defendants, it has been given upon the understanding that his business should not be closed unless particular reasons arose for it; and that if the defendants did close his business they should hold under the trust deed for the benefit of the creditors generally; that such was the understanding at the time, that he demanded a note in writing of such terms from Bruce, who said that there was no occasion for that, as it was understood that the defendant, Tasker, repudiated the idea at the time of taking any preferable assignment; that a few days after making the conveyance, the defendants shut up his (Rutherford's) business, sold the property conveyed by the deed and applied it towards the payment of their own debts. The bill sought for execution of the alleged intended trusts.

The evidence of the defendant, Bruce, was read for the defence, which was in nearly all particulars contradictory of Rutherford's evidence. Bruce's examination had been taken in New York, where he then resided. Mr. Hoyles, for defendants, took exception to any evidence to contradict the terms of the deed. The court would bear that in mind. The defence was that the stock with which Rutherford established his business had been purchased from the defendants—payments to be made in instalments; payments had not been made. Proceedings had been threatened and the deed had been given as security; a promise had been given that if Rutherford's business were found sound they would not disturb him, but on examining his books it was found bad and they closed it up and appropriated the proceeds of stock. Assuming the bill to be true, there was no fraud of which the law could take notice, the deed was plain in its terms, there was nothing fraudulent in its construction, it had been read, and its terms understood by Rutherford. No evidence could be allowed to disturb it.—*Coombe v. Levies*, 2 Mylre & Keen, 221, *ex parte Manley*, 2 E, Chitty, 50, *Fordice v. Wills*, 4, *Brown's Chancery cases*; *Meas v. Meurs*, *Concper*, 47, *Levin*, 27; *Intran v. Child*, 1 Br. Chan. cases, 13. The alleged fraud was not in the deed itself, but in subsequent proceedings—(*Starkie*, 555) assuming that no rule of law existed to include the evidence, it was insufficient to set aside a solemn deed, for it should be conclusive and satisfactory.—1, *Daniel, Chan. Practice*, 808. Rutherford should have been a party to the bill, he was a party interested, and for that reason the bill should be dismissed with costs.

Mr. Robinson closed, remarking on the exceptionable nature of evidence of Bruce and Tasker's answer. It was competent for a party to a deed to contradict or explain its terms for the benefit of others.—*Starkie*, 555, 576. The fraud was here in the *res gesta*, a promise was given at the time subsequently broken. Evidence is admissible for correcting a mistake.—*Pitcairn v. Ogborne*, 2, *Vessey*, 375. There was no occasion for Rutherford to be a party, he was not substantially interested, there was no residue.—*Faulet v. Bishop of Lincoln*, 2, *Atkins*, 290.

The Court reserved judgment.

On a subsequent day the following judgment was delivered :

The bill in this case was filed by the plaintiffs on behalf of themselves, "and of all others, the creditors of James Scott Rutherford," and part of the prayer of that bill was, that the defendants should "be decreed to be trustees of the said goods, wares, merchandize, &c, for the benefit of all the creditors of the said Rutherford, equally." It appeared in evidence that Mr. Rutherford was carrying on the business of a grocer in St. John's, in the year 1854, and that he was then indebted to the plaintiffs and others in several sums of money, and that upon the 5th of February in that year the two defendants pressed for a settlement of their demands against him, and obtained an absolute conveyance, in the following terms, of the property in his establishment: "Now, this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the said debts, and of the further consideration of five shillings in hand, paid by the said James Bruce and Hunter & Co., to the said James Scott Rutherford, at or before the sealing and delivery of these presents, he, the said James Rutherford, hath bargained, sold, assigned, transferred, &c., and by these presents doth bargain, &c, unto the said James Bruce and Hunter & Co., to the said James Bruce and Hunter & Co., their heirs and assigns, all and every, the stock in trade, as per inventory annexed, wares, merchandize, fixtures, and other goods and debts as per ledger produced, and effects whatsoever, whether in possession or reversion, now belonging, due or owing, to the said James Scott Rutherford, to have and to hold the same "unto the said James Bruce and Hunter & Co., their heirs and assigns for ever" The bill then alleged "that the said James Bruce and the said Patrick Tasker, who acted therein for himself and his said partners, induced the said Rutherford to execute the

said conveyance upon the express agreement and understanding that he should not be interrupted in the usual transaction of his business, and in realizing the said stock, unless a necessity should arise for such interruption, and that in case any creditor of said Rutherford should take proceedings to recover his debt from him, or in case his business as grocer should be closed by them, or by any such creditor, they should hold the same goods, wares, merchandize, fixtures, and debts, for the use and benefit of all the creditors of the said Rutherford, and to be shared equally and rateably with and amongst all of them."

That is the ground upon which the plaintiffs have filed their bill in this cause, and rest their title to relief in this Court, and that allegation in the bill is sustained only by the testimony of Mr Rutherford, while his testimony is in the most unequivocal terms contradicted on oath by Messrs Tasker and Bruce, and the terms of the deed of assignment when read corroborated the testimony of the two defendants, and are altogether repugnant to the evidence of Mr. Rutherford. Under such circumstances there is no foundation for asking the Court to engraft upon a deed, which is in its express terms a grant for the benefit of two individuals, an equity which would compel them to share that benefit amongst all the creditors of their debtor. I am, however, desirous that it should be distinctly understood that this is not a cause in which relief is sought from this Court upon the ground that the assignment was made with the fraudulent intention of a debtor in insolvent circumstances giving an undue preference to two of his creditors to the prejudice of his other creditors. No case of that nature has been brought before the Court in this instance: so far from anything of that kind having been alleged, Mr Robinson expressly stated "that when Mr. Rutherford executed that conveyance he was able to pay all his creditors twenty shillings in the pound."

Upon these grounds I am clearly of opinion that the bill in this cause must be dismissed with costs.

Mr. Robinson, Q. C., for complainant.

Mr. Hoyles, Q. C., for defendant.

1858, *January*. HON. SIR F. BRADY, C. J.

*Defamation—Libel—Jurisdiction of Colonial Court to try foreign Consul for—
Protest—Proper mode of objection to trial.*

Where the Spanish Consul in his official capacity wrote a letter to the Governor of Newfoundland, containing certain charges reflecting on the character of a Justice of the Peace for Newfoundland, the latter instituted libel proceedings against him. At the hearing the Consul entered a protest against the trial on the grounds that the court had no jurisdiction to try him for such a cause, that he could not be prosecuted before the tribunal of the country of his residence, and that the subject matter of the suit was a matter to be decided by the Government of Spain and the law of nations.

Held—The protest could not be received however available it might be as a ground of non-suit

WHEN this case was called the defendant's counsel rose and said that he had been instructed by the defendant, who was the Consul of Spain in Newfoundland, to lay before the court the protest given below. Mr. Pinsent proceeded at some length in support of the position which his client took to show that he was exempt for such an act as that which was the subject of the present action, from the jurisdiction of the civil tribunal, when he was stopped by the court.

The Court: "What have I to do with your protest? I will hear nothing unless you give me authorities. You have no right, sir, to act in this way, except you mean it as a trap for me."

Mr. Pinsent: "My Lord, I am only acting according to the instructions of my client."

The Court: "The instructions of your client! you are a lawyer, sir, and should instruct your client; who ever heard of a client instructing his lawyer! I'll have none of your protest, sir."

The Court then decided that such an application was out of place and could not be received, however available it might be as a ground of non-suit.

As Consul of Spain in this colony it is my duty to enter the following respectful protest:—

Being cited to appear before the Central Circuit Court of this Island to defend myself in an action taken by Mr. Grieve against me, for an act performed by me in the administration of my office of Consul of Her Most Catholic Majesty the (Queen of Spain,

* This case is inserted here as much for its historical as for its legal interest.—
EDITOR.]

I hereby enter my solemn and respectful protest against the authority of that court, or any other British tribunal, to enter into and make judgment upon a question which alone can be decided upon by the Government of Spain and by the law of nations, because:—"It is the right of consuls that they cannot be prosecuted before the tribunals of the country of their residence for acts which they do officially in virtue of the commission of their Sovereign, and under the authority of the Exequator. The consul, for his official acts, is inviolable, as are also the archives of the consulate, and neither the one or the other can be examined or taken by the local authorities under any pretext whatever." In all that I have done or written on this subject I have acted solely under my commission made at Madrid on the 28th of December, 1855, by Her Most Catholic Majesty Queen Isabel, and under the Exequator of Her Most Gracious Majesty Queen Victoria, made at London on the 26th of January, 1856, and under my oath of allegiance to my Queen; and for these acts and writings, I further protest that I am only answerable to my Queen through any representation that may be made to Her Majesty through Her Majesty the Queen of England. It is clear, therefore, that as my appointment has not been made under the English laws, and that as my oath of office has not been that of a British subject, I am only answerable to the government of my own country and the international law, and, in confirmation of the opinions herein expressed, Her Majesty the Queen of Spain has ordered me, through her Foreign Minister, to enter an energetic protest before the consuls of all nations represented in this colony, should any violence be attempted, overlooking my official position; that violence is now offered in the attempt to arraign me personally under the English law and before a British tribunal for the acts performed and writings made in my consular capacity; and for these reasons, and in order to render a compliance with that order of my Queen, through Her Foreign Minister, unnecessary, I hereby protest before the Honorable the Central Circuit Court of this island.

I am aware that "the consul in his private character is subject to the civil and criminal jurisdiction of the country in which he resides, but he cannot be arrested nor put in prison unless he commits a crime, and in such case custom demands that the Exequator should be withdrawn before he be judged, recognizing in his favor the principle that where he may commit crimes which do not offend the public order of the place

of his residence, the trial belongs to the courts of his own country"; such is the spirit of the law recognized by all nations when a consul is sued before the public tribunals of the country of his residence for acts done or obligations contracted in his private capacity; to this law I am and have always been ready most respectfully to bow, but in the present case where my official acts alone are complained of, I again most solemnly and respectfully protest.

Having thus protested, I beg to inform the court that whatever order or judgment it may please that honorable tribunal to make herein, I shall conform to most respectfully, referring the same to Her Majesty the Queen of Spain.

EL CONSUL EL MARQUIS DE CABALLERO,
CONDE DE LILLAHERMOSA

3rd November, 1858.

The jury (petty) was then called. There being one short of the number, Mr. Hoyles prayed a *tales*—when the names of two parties being furnished to the sheriff by his bailiff, he called James Byrne. The Court (angrily): "No, no! Not that man, not that man!" The sheriff hereupon, without an observation, called Samuel Payne, and the jury was completed. The defendant did not exercise the right of challenge.

Mr. Hoyles then opened the case. The plaintiff was Mr. Walter Grieve, who was well known to them. The defendant, a gentleman resident a short time in this country and known as the Marquis de Caballero, and filling the office of Spanish Consul. The action was brought by Mr. Grieve for the purpose of vindicating his character from gross and unfounded imputations made by the defendant in a letter from him to His Excellency the Governor reflecting upon Mr. Grieve in his capacities as a Justice of the Peace and Commissioner, by accusing him of the use of expressions on the bench of which he was wholly innocent. The defendant had availed himself of his position to make these representations, which, if sustained, would be damaging to the plaintiff's position and character, and from which the learned counsel trusted the proceedings of this trial would wholly vindicate him, and which, from all he could gather, could be only the result of malice on the part of the defendant.

Before drawing their attention to the particulars of the libel he would give them a little information as to the circumstances which had occurred here and in an adjoining settlement, and

out of which the present matter arose. In the latter part of December last a Spanish vessel called the *Plata* was wrecked at Trepassey, with a quantity of specie and other property on board, a matter in which the defendant greatly interested himself, and out of the circumstances attending the disposition of which property he thought fit to prefer a strong charge to the government of this colony very derogatory to the character and conduct of one of its officials (George Simms), whereupon the government, at the instance of the defendant,* appointed a committee to investigate and report upon the charges—the members of which were highly respectable, influential and trustworthy men, viz.: the Hon. Mr. O'Brien, President of the Council, the Hon. the Speaker of the Assembly, Mr. Robert Prowse, a member of the Assembly and Prussian Consul, and the present plaintiff, Walter Grieve, Esq., President of the Chamber of Commerce, and who, with Mr. O'Brien, was a Justice of the Peace. He (Mr. Hoyles) would only remark that the report of those commissioners was exculpatory of the conduct of Mr. Simms. The cause of the present action was the letter above referred to, in which the conduct of Mr. Grieve as a Justice of the Peace and a Commissioner was maligned. He would read the letter:

FEBRUARY 1, 1858.

SIR,—

I am sorry to be again obliged to trouble Your Excellency in order to inform you of the gross and ungentlemanly outrage committed against my august Sovereign the Queen of Spain by Walter Grieve, Esq., magistrate of this island, and in the actual exercise of his magisterial functions (as I am informed by Your Excellency's Private Secretary and by Mr. Grieve), by Your Excellency's order, in open court, as he sat upon the bench administering justice with certain commissioners. The circumstance occurred at the Court House of this city on Wednesday the 27th instant. The Spanish captain had been just dragged before the commissioners a prisoner, and, upon the book being repeatedly pressed upon him to swear, in his refusal at each time he referred to his Queen, the Queen of Spain; upon his repeating this reference to his Queen several times, this magistrate, in an unseemly burst of anger, permitted himself to use the name of my Queen in the following low and profane terms: "*Damn the Queen.*" As I am a foreigner I

* This statement, we are given to understand, is not true.

know not whether such an expression used by an administrator of public justice (and Your Excellency and Mr Grieve himself tell me in the letters above referred to that he was at that time exercising those grave functions, and therefore representing Her Most Gracious Majesty the Queen of England), I do not know, I say, if such an outrage, if applied to his own Queen, would be deemed a punishable offence, but for such an offence coming from a magistrate in open court, in the act of administering justice, and so representing his sovereign, I, the Consul of Her Most Catholic Majesty in Newfoundland, require an immediate explanation, in order that when I cause the statement of this outrage to be laid at the feet of my Queen, I may, at the same time be enabled to communicate to Her Majesty that such a wrong was repaired by the instant action of Your Excellency in the exercise of Your Excellency's executive functions. In arriving at the truth in this instance Your Excellency can find no difficulty, because the expression was used in the presence of two other magistrates, two other commissioners, several other governmental officers, several gentlemen of the bar, and a number of private citizens.

I have the honor to remain,
Your Excellency's most obedient, humble servant,

EL CONSUL EL MARQUIS DE CABALLERO,
CONDE DE VILLAHERMOSA.

*To His Excellency Sir ALEXANDER BANNERMAN, Knight,
Governor and Commander-in-Chief of the Island of
Newfoundland and its dependencies.*

In reply to this the Governor set on foot the enquiry suggested, and the result was as contained in the following letter from His Excellency to the defendant:

GOVERNMENT HOUSE,
NFLD., 3RD SEPT., 1858.

SEÑOR MARQUIS,—

I am desired by the Governor to state, in reply to your letter of the 30th January, that the gentlemen constituting the commission to investigate the charges preferred by you against Mr. Simms and others for conduct of a felonious and highly criminal nature in relation to the wreck of the *Plata* were selected by His Excellency for their commercial experience, their local knowledge and impartiality, and the fact of two of

these gentlemen being likewise Justices of the Peace for the island induced His Excellency to hope that, so far as the legal powers and undoubted competency of those gentlemen extended, nothing was wanting on their part to vindicate the laws of the country.

On public grounds it is, therefore, a matter of regret to the Governor that you have thought proper to resist the enquiry by refusing to give evidence yourself or permit the captain of the *Plata* to do so.

In reference to your letter of the 1st February, I am also directed to inform you that His Excellency has caused inquiry to be made from Mr. Grieve and the other commissioners, and also from the professional gentlemen present in the Court House when the captain was brought up for examination, and from the information he has received His Excellency is convinced that you have been misinformed as to Mr. Grieve having made use of any expression of disrespect towards Her Most Catholic Majesty the Queen of Spain.

I have the honor, &c., &c.,

(Signed),

W. J. COEN,
Private Secretary, &c.

To the Spanish Consul.

This inquiry and its result ought to have been sufficient to satisfy the consul, and should have ended the matter so far as he was concerned, but the plaintiff had another duty to perform in finding out the name of the slanderer, if any other than the defendant himself, and therefore through him (the learned counsel) wrote the defendant the following communication :

TO THE MARQUIS DE CABALLERO, &c., &c.

SIR,—

I have been instructed by Mr. Grieve to request that you will furnish him with the name of the party or parties on whose information you complained of him to His Excellency the Governor for having, as you alleged, spoken disrespectfully in his official capacity of the Queen of Spain.

From the fact of you having made no attempt to substantiate the charge, Mr. Grieve is of course justified in assuming that fuller enquiry has satisfied you of its falsehood. It would, perhaps, have been more in accordance with what was due to Mr. Grieve's position if you had made this enquiry in the first

place, but, as you omitted to do this, it is only just that you should now make such amends as may be in your power by unequivocally retracting the imputation you cast upon him and by enabling him to prosecute the persons with whom the slander originated. Should you decline to afford this information, Mr. Grieve will hold you responsible for the charge and will institute legal proceedings against you accordingly.

Yours, &c.,

(Signed), H. W. HOYLES.

February 15, 1858.

To this the following reply, in which, in the same spirit as had already been exhibited to-day, he would claim to be above all law, was received :

FEBRUARY 15TH, 1858.

The matter of which you speak in your note of to-day's date is one which remains for the English and Spanish governments to determine, and I would beg to be informed by what right you mix yourself with it, or whether the English government has invested you with authority to demand explanation from an officer of the Spanish government, for you must be aware that as such I reside in Newfoundland.

This consulate will not enter into any further correspondence on this subject.

I remain, yours, &c.,

EL MARQUIS DE CABALLERO,
&c., &c., &c.

To H. W. HOYLES, Esq., Q.C.,
&c., &c., &c.

The defendant having refused to supply the name of his informant, and thus to shew that he was the innocent dupe of some designing person and not the malicious defamer himself, had rendered himself fairly liable to the present action, as the person who was prepared to bear the responsibility of the libel.

The defence attempted to be set up was two-fold. In the first place, a denial of the libel—that he did not write it; and secondly, that it is all true, and he comes here to satisfy you of its truth. They had only to take up the document and read it to see that it must have been dictated by strong motives of anger and malicious feeling; and they would take this in connection with the reply of the Governor, which ought to satisfy

any reasonable man with the arrogant refusal to give the name of the informant, and also in connection with evidence which the plaintiff would bring to shew that last spring when the plaintiff was about sending a vessel to Cuba, he sent his clerk to the consulate for the vessel's papers, when the defendant, hearing that Grieve was the owner, said he should feel it to be his duty to indorse on the papers that the cargo belonged to the man who damned the Queen of Spain; what could the object have been but to injure the plaintiff in his property when it got to a Spanish possession? Taking all these circumstances into consideration, they could not fail to be convinced of the malice of the libel; and as to the question of truth, he (Mr. Hoyles) would not for the present call any evidence on that point, but leave the defendant to prove it if he could, which he believed he could not, and in case he brought any evidence of that kind, to meet by a rebutter if necessary.

Plaintiff's witnesses were then called.

Lieut. Coen (Governor's Private Secretary)—Was aware that there was such a gentleman as the defendant; he was Spanish Consul; knew plaintiff. (Here the letter, the subject of the action, was handed witness). That letter was from the Spanish Consul, and was received by His Excellency the Governor; he is Private Secretary; this was the Governor's reply (objected to by Mr. Pinsent). By the Court: The plaintiff complains of a libel contained in a letter from defendant to the Governor; this is the reply. I think it may be admitted for the purpose of shewing if such steps were taken as were desired, and the result; but I will reserve the point.

The Chief Clerk then read the letters.

Mr. Joseph Crowdy—Was clerk in the Secretary's office; knew the parties. The last general commission of the peace was issued in 1843; that was it (produced commission). Mr. Grieve had acted under the commission ever since; he was appointed commissioner to examine into the circumstance of the wreck of the *Plata* in February last (document handed him); that was the commission; it had the Governor's signature and seal; the commissioners reported (Evidence of the report was objected to by Mr. Pinsent, and disallowed)

Cross-examined—There had been no new commission of the peace since 1843 for the central district; there were commissions for the northern and southern districts in 1852, in which Mr. Grieve's name was not; there had been new appointments added to the commission of 1852. Called the document by

which Mr. Grieve was appointed to investigate about the *Plata* a commission, although it had only the Governor's seal; thought it was a commission; it was a warrant; was not aware when his functions as a commissioner ceased.

The Chief Clerk read the document nominating the commission; it contained an authority to examine witnesses on oath and to report.

Mr. Robert Thorburn, called—Was in plaintiff's employment. Plaintiff sent a vessel in March to Cuba; went to the consulate to get the papers for the vessel. (Mr. Pinsent objected to evidence of what was said then, because it was subsequent to the libel, and there was no proof of the plaintiff being in office as commissioner. Mr. Hoyles cited authority to shew that subsequent expressions may be given. Court admits evidence). Mr. Thorburn continued—The consul said "who is the owner?" I replied, "she was chartered by plaintiff, but belonged to the captain as far as I knew." He asked "who owned the cargo?" I said Mr. Grieve. He said, "I must note on these papers that the owner of this cargo is the person who said damn the Queen; it is my duty and I am determined to do so." He (witness) said he knew nothing about it, it was between Mr. Grieve and him; did not see what it had to do with the cargo of fish; defendant did not say much then.

Cross-examined—He gave me the papers as usual; told Mr. Grieve when he came back. Mr. Grieve said he had taken a memorandum of it; the memorandum was in his own handwriting; made no draft of it; that was the only copy; kept it expressly; had never been out of his own possession; did not require any directions to keep it; knew it was necessary to do so; was plaintiff's nephew; had been nearly seven years with him; had been to the consul's since; he is a very mild, gentlemanlike man; not very so on that occasion; plaintiff frequently used the word 'damn'; frequently on the wharf; never heard him in the office cursing; on the wharf it was too far; didn't say he was in the habit of swearing; did not beat every one indiscriminately; he is not in the habit of beating everybody that comes near him; heard a good many stories about him; didn't know anything personally about the story of the boy and the billet of wood; from the Queen of Spain's general character should not be surprised at Mr. Grieve's having used the expression, or at anyone else saying so.

Mr. Hoyles said that was the plaintiff's case.

Mr. Pinsent then moved at considerable length for a nonsuit, on the following grounds:—

1st—It was no libel.

2nd—There was want of due proof of appointment as justice of the peace; no proof of dedimus; no proof of having taken the oaths; no proof that he was exercising the office of justice as to the matters of the libel; that the appointment of justice can be but by patent from the Queen.

3rd—The office of a commissioner not an office of honor or emolument of a permanent character, to become the subject of a libel.

4th—That the communication containing the alleged libel was official and privileged, particularly so in the case of a consul.

5th—No proof that the special character of commissioner belonged to plaintiff at the time of the publication of the alleged libel.

6th—That if it were so proved, plaintiff has not been proved to have been acting in both characters, and the innuendo is not divisible.

7th—That malice is rebutted—that there is no proof of probability of malice to send the case to the jury.

8th.—That there is no averment in the declaration that there is a Queen of Spain, and no innuendo after the words “Damn the Queen” to connect them with the Queen of Spain.

In support of these points the learned counsel cited several authorities.

The Court would send the case to the jury, but would reserve all the points.

Mr. Pinsent then said: May it please your Lordship, and Gentlemen of the Jury,—I have the honour to appear as counsel for the defendant, in the place of a gentleman who has lately been elevated to the bench—I mean the Hon. Judge Robinson. I feel I have a delicate and important duty to fulfil, and while I am satisfied that no effort has been or shall be wanting upon my part in advocating the cause of my client, yet at the same time I crave your indulgence and consideration when you observe that the interests of the defendant are committed to the advocacy and care of one whose comparative inexperience is opposed to the most matured ability and experience of the bar. I believe that, before the conclusion of this case, if you are not already of that opinion, you will agree with me when I say that the plaintiff stands in a position both ridiculous and contemptible. The plaintiff is a person well known to you in this community as a leading merchant, but happily seldom in the capacity of a

justice of the peace or public commissioner. He brings his action for an alleged libel, and seeks to recover damages at your hands, aye, one thousand pounds damages against a distinguished gentleman, the Marquis de Caballero, a nobleman of Spain, a stranger, and the representative in this country of the Spanish nation and of Her Most Catholic Majesty the Queen of Spain, and that for an act done in the honourable and legitimate exercise of his consular office, in representing to the only proper authority, His Excellency the Governor of this colony, the disgraceful conduct of which (as he believed at least) the plaintiff was guilty, in the very act of exercising his office of justice of the peace and commissioner in the investigation of matters which became peculiarly within the province and protection of the defendant. You have heard described to you to-day by learned counsel for the plaintiff the circumstances under which Mr. Grieve came to be acting in these capacities, as is alleged. One of the subjects of the Queen of Spain, owner and commander of a Spanish ship, met with a very severe misfortune in the stranding of his vessel on one of the worst parts of our coasts, at the most inclement season of the year, and the circumstances attending that loss, in the wanton destruction and plunder of property of very great value, were such as to induce the Government to appoint a commission of inquiry into the circumstances, particularly into the conduct of one of its own officers; a commission, however, so constituted as not to meet the approval of the defendant or of the unfortunate captain, and which therefore they neither recognized nor submitted to, why I need not here say—we have in this action but little to do with the occurrences to which I have referred, beyond the fact of their having been the origin of the commission; and while my learned friend says the report was favourable to Mr. Simms, we disclaim all privity with it, and we do not condescend to make capital of that matter for the purpose of aiding us in this. This libel, it is said, is to be found in the letter put in evidence to-day and addressed to the Governor. Gentlemen, there are several essential elements in a libel; the writing must be such as to be attended in a case of this kind with degrading consequences; it must be the means of making the party libelled an object of public ridicule, hatred or contempt. Assuming this writing to be a libel, and supposing it to be possible that the question of damages should come under your consideration, I ask you to search your own breasts and say, is Mr. Grieve an object of any greater ridicule, hatred or contempt because of

the writing of that letter? Does it convey such sentiments to your mind? Rather on the other hand would you not be inclined to discover all that is ridiculous and contemptible in this action in the fact of his bringing it into Court?

Gentlemen of the jury, we next come to the question of publication. True it is that in the eye of the law the mere communication by letter of matter of a libellous character to one person, not being the plaintiff, is a sufficient publication to supply that ingredient to the action of libel; but the nature of the publication is very important when you come to consider of the question of malice, without the existence and proof of which such an action falls to the ground. What has the publication in this instance been? the simple communication of the matter to one person, and that, His Excellency the Governor. Who has made that letter public property? Who has proclaimed his own disgrace to the world and circulated that abroad which otherwise would have been known to but few? the plaintiff, not the defendant. I have been speaking generally; I now come to the chief question in the present aspect of the case. That letter, we say, is no libel; it is what is termed in law a privileged communication—that is, it is an official document, and therefore exempt; in saying so, we ask you to regard the parties concerned, the occasion and the subject matter. It is from the defendant as Consul of Spain, as the representative of his country's interests, commercial and political—as the protector of the lives, liberty and property of his Queen's subjects; as the guardian of the honour of his Sovereign and his country. These are his peculiar attributes; these the peculiar objects of his protection and care. It is concerning these objects that he writes; it is of the aggressor that he writes; it is to the legitimate authority that he complains; the authority to which reason would direct the appeal to which the law of nations commands it to be made. Are you not satisfied that if ever there was a privileged document this was one? But, says the plaintiff, you have availed of your position to concoct a malicious writing; you have passed the bounds of official propriety; you have subordinated and perverted your public character to despicable ends; you have used the cloak of office to hide if possible the gratification of personal ill-will. Gentlemen, do you, can you believe it? Does not every circumstance go to rebut such a presumption? this alleged libel negatives the presumption of malice. I have shown you how it was written, because of the obligation of office; it prayed investigation; it

bears the stamp of everything that is reasonable and decorous, and strictly official, on the face of it; worse than that it could not be, for there was no personal relationship, no personal knowledge indeed of the plaintiff by the defendant; he had no object in life of a personal nature to serve. For my own part I had no objection, did it bear the impress of indignation upon it. Imagine to yourselves the feelings of a man in the position of the defendant—with such a tale of wrong and outrage told him as that document reveals—would they not be feelings of profound indignation? would not his loyalty revolt at the wanton insult flung upon his Sovereign, and thus upon his country, by a man, by his own account, in the actual exercise of functions of the gravest and most sacred character; functions which he should have exercised with peculiar solemnity and delicacy under the circumstances, where foreigners were concerned. But they say they have something more than the document to prove the malice. We show them that the Governor had an investigation and he was quite satisfied of the plaintiff's innocence, and that notwithstanding that, (although, mind you, we knew of no investigation and were made no parties to it) we refuse to give up the name of our informant. Gentlemen of the jury, are you not astonished at such an indecent request? Probably not, it is what you might have expected; but this you know, that the name informer stinks in the nostrils of every man having the humblest pretensions to be thought a man of honour; and of this I feel assured, that if my client could have stooped to anything so low; if he could have been so lost to every sentiment of honour and good faith as to have yielded up the name of his friend, and caused him to be dragged into a court of justice, and be made the subject of an action at law to screen himself, he would have stood in a very different position here to-day, and you would have regarded him just as he should be regarded, as an object too vile and contemptible to be the associate of respectable men. Then we leave them wholly dependent upon Mr. Thorburn's evidence for the proof of malice—a trifling occurrence which took place afterwards giving the plaintiff the full benefit of it, how can it be said to be evidence of the existence of malice at a prior period under totally different circumstances—an expression used most probably (if at all in the way described) in joke, or in reference to the past occurrence,—to shew that there was nothing serious in it. Gentlemen, it is shewn that notwithstanding what was said—the papers were granted as usual—and where is the proof that any-

thing went wrong with the cargo, or that the plaintiff has suffered by any act of the defendant, how gladly would they have availed of it if such had been the case. It shews most strongly the absurdity and weakness of their cause when they catch at such a straw and invest it with a weight that their own malignant insinuation gives it. Where now is the malice? Observe the studied preparation for this case; mark how the instincts of the uncle take hold of the worthy nephew and protegee—his second edition; how ready he was to run with the silly tale and make a record of it to be used in judgment to-day; neither, I am sure, did it escape you how wantonly and impertinently he added insult to injury, and in the very act of giving his sworn testimony, aggravated the outrage for which his uncle sues the defendant in this action for saying he was the author. But that young gentleman's testimony is of value to us, it is important to shew the animus which exists in the mind of the plaintiff, and you are bound upon your solemn oaths to find that he has fully satisfied your minds; the document containing the alleged libel has ceased to be privileged because it was the creature of malice—you are called upon I repeat, and it is a grave consideration to proclaim by your verdict, that the object of the Marquis de Caballero at the time he wrote that letter, was the gratification of the basest feelings that can disgrace human nature—that he has abused his sacred trust, and made the privilege of office subservient to the indulgence of personal revenge, and that without even the show of reason; in a word, that when he wrote he knew or believed that he was writing a lie; are you prepared to say so? I think not; then your verdict on this issue must be for the defendant.

We have now arrived at the second view of the case; we have yet a broader ground of defence. True or false we are entitled to your verdict, because it was an official representation made in good faith; but we say further we made it on good grounds; we made it and it was true; we were convinced and are still convinced of its truth; we are prepared to convince you, gentlemen, of its truth. This is the second ground of our justification. We shall call gentlemen whose characters are above suspicion, whose testimony no one would dare to question the accuracy of, who cannot be mistaken. They were present when the Spanish captain I have referred to, was dragged up before this illegal commission, and while he was in the act of protesting against its assumed right to compel him to give evidence, and in doing so referred to his consul and his Queen, the plain-

tiff in this suit did use the words, at a time when he claims to have been acting as a judge and a commissioner, "Damn the Queen"—not these words alone, gentlemen, but in reference to the captain, who was not sworn and did not consent to be sworn, "The damned fellow is a perjurer," or "He is a damned perjurer"; when one of his brother commissioners, conscious of the brutal impropriety, said that cannot be, the man is not sworn; then said the plaintiff, "He is telling lies by the bushel." This is the language, gentlemen, that we are prepared to prove by testimony which you will not hesitate to believe that the plaintiff used.

Gentlemen of the jury, can you imagine an occasion and circumstances which could more behave a man to have exercised the greatest caution, to have behaved with the strictest propriety, to have acted with most delicate decorum, to have observed greater solemnity of deportment than that occasion, when, as the plaintiff asserts, he was exercising the functions of a judge and engaged as a commissioner sworn and bound by every legal and moral obligation to do impartial justice between man and man? What confidence, pray, could any man, much less a friendless and defenceless foreigner, unacquainted with the English language, place in the proceedings of such a person? It would be difficult to discover a greater object of public reprobation and contempt than a judge so lost to all sense of shame and decency and honor. However you may endeavor to excuse one who from excitability of disposition, rudeness of manner, or constant habit, may indulge in the use of profane language in the private associations of life—as the hero of the wharf, or the tyrant of the counting-house—yet when he attempts to assume the discharge of such sacred duties as I have referred to, he should be careful to reserve such conduct and language until his return to his more natural element.

With these observations I have, for the present, nearly come to a close, as I shall, I perceive, have another opportunity of addressing you, and that more particularly as to the evidence with which we have been threatened upon a rebutter case, only again impressing upon you that if you acquit my client of malice on the first issue, you will not need to consider the second plea of truth; and that in coming to a just conclusion on the first, you will very probably take into consideration the fact (assuming it to be possible that at the close of this case your minds could be in doubt as to the truth of the alleged libel) that at all events the defendant had sufficient evidence to justify him in the course which he pursued.

Gentlemen of the jury, I leave the case in your hands, convinced that you will not be the men to act otherwise than with honesty and independence, and that you will not allow it to be said that a foreigner looked in vain for justice at your hands.

The defendant's witnesses were then called.

His Excellency the Governor: The defendant he knew as Consul of Spain was recognised as such by him, and by the British Government; considered the letter to be an official communication from the consul to him; received it as such; knew nothing of the exequator; had never seen a copy of it; had not a copy of it.

John V. Nugent, Esq, sheriff, called: Was present at sitting of commissioners; was present when captain Marristany was brought up as a witness; they were then about adjourning to half past one. On their return they endeavored to make him swear; he refused to be sworn, repeated his refusal several times, urging that he was a subject of Spain and could give no evidence without the authority of his Queen who was represented by the Consul here; the captain had been arrested to be brought before the commissioners; the interpreter was in the act of stating what was said about the authority of his Queen, when Mr. Grieve said "Damn the Queen." Immediately before that there were other words used with regard to the Spanish captain Mr. Grieve said he was a "damned perjurer." Mr. O'Brien, who sat next to Mr. Grieve, said "No, he is no perjurer, he is not sworn." Well, then, said Mr. Grieve, he is telling lies by the bushel." I thought Mr. Grieve was excited at the frequent repetitions of the captain and his refusal to give evidence.

Cross-examined.—Was not all the time present at Commission; sometimes was engaged in my official business as sheriff; was present from time captain Maristany was brought up; was once or twice out on either day; the inquiry continued four days, the 26th, 27th, 28th, and 29th January. The four commissioners, two other magistrates, several gentlemen of the bar, and others were present; have frequently spoken of the occurrence to the Consul.

Mr. Hoyles: You were the person then who told the Consul of it

Witness: No.

Mr. Hoyles: What, you never told him of it?

Witness: Twenty times

Mr. Hoyles: Why you have just sworn you did not tell him.

Witness: I have not.

Court: Why, sir, I have taken down your answer where you swear you did not tell him.

Witness: My lord, that question was only asked once, and I answered it correctly. Mr. Hoyles asked me if I were the person who told the Consul. I told him truly, my lord, I was not.

Court.—I can't understand your evidence, sir.

Witness: Mr. Hoyles's question to me, my lord, appeared to mean was it I that gave the Consul the first information on the subject, and my reply was in the negative. If to tell it, meant to give information gratuitously, and without being asked, told only too as far as he could then recollect. The one was immediately after the occurrence, that same evening to Mrs. Nugent, the other some time after, to Mr. O'Brien. The latter time, indeed, it was in conversation with Mr. O'Brien. Did not volunteer it to him; it was in answer to a question; mentioned it to Mrs. Nugent on his return from Court, immediately after the occurrence, to tea, and they had arranged until things had calmed down, the Consul should not know it. Then went into tea and found all the family talking the matter over. The Consul was present and had already heard it, and all had a conversation on the subject, the persons present beside the Consul, Mrs. N., and himself, all of his children who were then in the country; talked of it then, and all spoke of it, the Consul never told witness from whom he first heard it; conversed with him on it over and over again; had mentioned it frequently; took a great interest in the proceedings of the commissioners, attended to see how things were going on: didn't understand Spanish, means that the interpreter repeated the words Consul and Queen; was at left hand of the table at which commissioners sat, and sat on their left, only Mr. Shea between witness and Mr. Grieve; it was on the 27th of January, but didn't recollect the day of the week; have had some conversation with Mr. Piusent (defendant's counsel), did not instruct him in the case; the Consul speaks English; was never present at any consultation between them; those papers (letters, &c., given in evidence), were in his son's writing, with Consul's signature; had no hand in the manufacture of the libel, or in writing or preparing it. The Consul had sometimes consulted him; knew the letter was to go; was not aware he ever saw it; not unlikely he did; most of the papers the Consul had been good enough to shew him; was not aware he saw the draft; strong impression he did. Mr. O'Brien answered Mr. Grieve's observation about

perjurer. Mr. Grieve spoke very loud. Re-examined—His son, to whom he had referred, was the Consul's secretary.

The Court here adjourned until to-morrow at 11 o'clock.

Thursday, Nov. 4.

Hon. James Tobin (Financial Secretary), called.—Was present at the sittings a short time one day; they adjourned and re-met when the captain was required to give his evidence; they endeavored to swear him and induce him to give evidence; he refused and bandied the terms Consul and Queen repeatedly when Mr. Grieve said "Damn your Queen," as if the repetition annoyed him. He said something about the captain being a perjurer; someone in the Court said (believe it was one of the commissioners) that the captain was not sworn, and could not be a perjurer. Mr. W. Prowse, the interpreter, said it was he said so; at all events Mr. Grieve replied he was telling lies; couldn't say he heard the word bushel; didn't know the measure. Plaintiff was very much excited; was well acquainted with the Marquis de Caballero. In manners, deportment, and disposition he is most gentlemanly and amiable; he is both a scholar and a gentleman. Am Financial Secretary; it was his duty to give warrants for payment of employees of the Government; there was a warrant sent down to pay the four commissioners, the interpreter and clerk; had known Mr. Grieve ever since he had been in the country very well.

Cross-examined.—Did not say he paid the officers of the Government, they don't trust him with the money; am on intimate terms with the Consul; didn't know he was on bad terms with plaintiff. Some seven or eight months ago, he (plaintiff) took a miff he believed about this very matter, and had since ignored him. Was sitting with his back to the inner door, on the left hand of the fire-place; the room is nearly square; only there the day in question; there when they were meditating bringing up the captain. As he was made pay once for arresting a man, he took an interest in the proceedings to see how they would get on; thought Mr. Carter, the magistrate, was near him. There were times he didn't hear so well as at others, but only when he had a cold in the head or was too far off, neither of which was the case then; thought he mentioned the circumstance to Dr. Shea coming out of the Court House; when the Consul asked him he mentioned it to him and said it was perfectly true; didn't know who told the Consul in the first place; often talked it over with Consul and

Mr. Nugent ; talked it over before coming into Court as recently as last night. Mr. Nugent was sometimes present when Consul and he talked it over ; three generally make a trio ; he spoke to Mr. O'Brien on the subject, considered it a great outrage ; spoke of it as such ; was not shown the libel or the draft ; not in habit of seeing Consul's despatches ; have seen some but not prior to sending ; said it was Mr. Woodley Prowse ; thought it was his father who replied to Mr. Grieve.

Re-examined—Was on very friendly terms with Mr. Grieve prior to the occurrence.

Mr. R. Janes, called—Was present each day at the sittings of the commissioners, but only occasionally ; was in and out ; was there when the Spanish captain was brought up, but only for a moment ; did not hear Mr. Grieve say anything ; he said nothing while witness was present

Court to Mr. Pinsent—"What do you mean, sir, by bringing such witnesses ? Do you think I have nothing to do but to take down such examinations, making a farce of the Court !"

Mr. Joseph L. Nugent, called—Was present when the captain was brought up and spoke of his Queen and the consul ; after the captain had said this several times, plaintiff said "Damn the Queen" ; he also said the captain was a perjurer ; some one said the captain was not sworn ; he then said he was telling lies ; the people about laughed.

Cross-examined—Was nineteen years of age ; lived with his father ; the matter has been a frequent subject of conversation ; that was the only day he was there ; dropped in by accident ; was there about an hour and a half ; some persons were laughing and he did not exactly hear what was said about perjurer ; thought some of the commissioners were laughing ; was never in the room before ; was in court house before, and had been present at a trial ; was sitting by the door leading to the hall ; it was said loud, so that all who were listening might hear ; the words were "Damn the Queen."

Mr. Pinsent said that was defendant's case.

Mr. Hoyles then proceeded to call witnesses on rebutter.

Hon. G. J. Hogsett (Attorney General), called—Recollected proceedings ; conducted them before the commissioners on behalf of the Crown ; was there for nearly a week during whole proceedings ; paid attention to everything ; recollected the captain being brought up to give evidence and refusing to be sworn ; *did not hear* Mr. Grieve use such expressions as "Damn the Queen," or "Damn the Queen of Spain" ; these words could

not have been used without my hearing; a summons had previously been issued for Maristany to come.

Cross-examined—*Did not hear any expressions used by plaintiff with regard to or reflecting upon the captain, or the mode of his giving evidence; no observations of such a character as perjured or damned perjurer was fixed in his memory; remembered the use of no improper expressions; was sitting at the Bar table; commissioners at other table; the captain was brought up in charge of a constable by direction of two of the commissioners, who were justices of the peace; (to a question "did you advise the captain's arrest?" "I refuse to answer, as the question is privileged.")*

Hon. L. O'Brien, called—Was one of the commissioners; Messrs Grieve, Prowse, and myself; plaintiff sat alongside of him on the left hand, Shea and Prowse on the right; the only recollection he had was the words consul and queen being mentioned by the interpreter explaining words of Spanish captain; it was that he would not give his evidence without their consent; did not hear to his knowledge the words "Damn the Queen" used by plaintiff; when the captain was prevaricating in giving his evidence, Mr. Grieve said "the damned fellow is perjuring himself; he (witness) immediately replied. He has not taken the oath.

Hon. the Speaker of the House of Assembly (A. Shea), called—Was one of the commissioners; did not hear the words; Mr. Grieve was on his right; the captain was not very close to table; witness was at the corner, Mr. Nugent was a little from the end; did not see how it could be said without his hearing.

Cross-examined—Heard plaintiff say "Damn the fellow, he is perjuring himself"; Mr. O'Brien replied, he was not sworn; didn't hear anything more; wouldn't swear that we were not talking and laughing a good deal together; at that time the captain and interpreter were also speaking; didn't see any great difference between using those words and "Damn the Queen"; the commission was as well conducted as this court.

Mr. D. W. Prowse, called—Was the interpreter; stood at the corner of the table; did not hear the expression "Damn the Queen."

Cross-examined—To the best of his recollection plaintiff said the man was a perjurer; didn't think he said "damned"; Mr. O'Brien and Mr. Prowse and witness all said, "that was not so, that he was not sworn"; was attentively engaged with the witness (Captain Maristany) interpreting; there was consider-

able conversation going on between witness and the captain, and a discussion between the commissioners; was standing sideways, addressing the witness (Captain Maristany) who was at an angle from the table.

Mr. R. R. Lilly called—was clerk to the commissioners; was at the east end of the table; did not hear the expression; was taking down the evidence; paid most particular attention to what was going on; during this time the interpreter was endeavouring to make him understand; was endeavouring to take down what the captain stated; heard plaintiff say the fellow was perjuring himself; do not remember “damned”; should say he ought to have heard the expression if used.

Cross-examined—Had pen, ink and paper before him attentively taking down what he could catch from the interpreter; was attentively watching the proceedings between Mr. Prowse and the captain; made record of the conduct and refusal of the captain; would only say he did not hear it said, only the other expressions; must have been in a low tone.

Mr. P. W. Carter (Police Magistrate) called—Was there from commencement; must have heard the expression if used; went there because he found that the commissioners were authorized to swear witnesses, but could not see they had authority to arrest; noticed proceedings particularly; Mr. Tobin was by him three or four minutes; left him and went closer to table.

Cross-examined—*Denied on oath the use of the expression by the plaintiff; did not hear the expression “damned fellow” applied to the captain; did not go there to confer the power of arrest; went for the same reason as Mr. Tobin; conceived it to be a new court erected; (the witness was then proceeding to express his favorable opinion of Mr. Grieve, his long acquaintance with him, and other matters irrelevant, when he was stopped by defendant’s counsel).*

Mr. T. Kough called—Was present, but did not hear the expression.

Mr. C. Simms called—Was present at the time in question; paid particular attention to proceedings; did not hear any such words; sat between the window and entrance door to Judges’ Chambers, to the east of Mr. Prowse, nearer him and Mr. Lilly than any one; considered it impossible for him not to have heard it unless said in a whisper.

Cross-examined—The inquiry involved charges of a very serious character against his brother, preferred through medium of defendant.

Mr. Devereux called—Did not hear the words; must have been spoken very low if he did not.

Cross-examined—Was near the door; the other side of the door; wouldn't undertake to swear it was not said; did not hear the expression.

Mr. George Simms, jr.—Was present and did not hear.

Cross-examined—Was one of the parties charged in commission.

Mr. John Simms—Sat near Mr. Hogsett; did not hear it; would not undertake to swear it was not said; was one of the parties implicated in the transaction about which commission was sitting.

Mr. T. Mitchell (Inspector of Police)—Was there on the occasion; paid attention to what passed; did not hear "Damn the Queen"; if such words had been used, thought he would have heard them as he heard the other expressions addressed to the captain by the plaintiff.

Cross-examined—Did not hear the captain or any one else in the room make use of the word Queen; would not undertake to swear that that and the other words were not used; thought that if not said in a whisper he should have heard.

Mr. L. T. Chancey (Sergeant of Police)—Was standing by the captain; did not hear the expression "Damn the Queen"; to the best of his knowledge would have heard it if said.

Cross-examined—Heard plaintiff say of the captain that the fellow was perjuring himself; heard nothing of "lies" or "telling lies by the bushel"; did not hear the use of the word "Damn"; went the day before to the consul's office and saw the captain; served summons on him to attend; he did not appear to understand; was told by consul he should not attend; next morning brought him (captain) in custody to give his evidence before commissioners; Mr. Grieve was one of them.

Mr. Walter Grieve (the plaintiff)—Was one of the commissioners; sat on the commission; the captain was brought up and a number of questions put to him; Mr W. Prowse was interpreter; captain refused to be sworn; he did not recognize the right to be brought there at all; did not use the words "Damn the Queen" or any such expression; the first intimation he had of it was when the Governor sent him a copy of the letter; never heard it mooted before.

Cross-examined—Commenced sitting on Tuesday; sat until Thursday, which was either 17th or 18th January; did not sit after Thursday; said to one of his brother commissioners "that

fellow is perjuring himself"; Mr. O'Brien, with his usual readiness, said "he has not been sworn"; said the words in a whisper; had heard what his witnesses had said; would not swear he did not use the word "damned" in connection with "fellow is a perjurer"; thought that he made use of such an observation as that the captain was telling lies, or lies by the bushel; did not think he ever had exchanged words with the consul in his life; (defendant's counsel here proceeded to examine the witness as to whether he had ordered the arrest of Captain Maristany, and as to the proceeding before the commission, for the purpose of showing the illegality of the commission, when he was stopped by the Court). Witness proceeded; was in the frequent habit of cursing and swearing; there was many a day passed he did not swear; sometimes went from words to blows; did sometimes swear when he met with a queer customer like him (the consul); did sometimes use blows to get rid of his customers.

Mr. Hoyles said that was the plaintiff's case on rebutter.

Mr. Piusent then addressed the jury at great length, particularly commenting upon the valuelessness of negative evidence in a case of this kind, and reviewing the evidence on rebutter.

Mr. Hoyles then closed the case in a speech in which he reviewed the whole from beginning to end, and stated at its close that the plaintiff did not want the defendant's money, but only to vindicate his character.

The Chief Justice then charged the jury as follows:

Gentlemen of the jury,—In this case the plaintiff, Walter Grieve, takes his action against the defendant, the Marquis of Caballero, and in that action complains that the defendant libelled him in a letter to His Excellency the Governor of this colony, and claims as damages the sum of one thousand pounds. To that the defendant has pleaded two pleas, viz: "not guilty," as his letter was a privileged communication, and that the language was actually spoken. He states that it was his duty as Consul of Spain, and the sole representative of his sovereign in this Island, to make the communication of which the plaintiff complains. As in this case the matter has been ably and clearly argued by the learned counsel on both sides, it is unnecessary for me to enlarge upon it. And from the attention you have given to the evidence, and the arguments of counsel both yesterday and to-day, I am satisfied you will come to a correct conclusion thereupon. The case has been placed before you with great clearness, and has been conducted throughout with great

ability by the learned counsel; but I must observe that there has been, as was naturally to be expected, some heat on both sides. I need not observe to you that it is your duty to allow this to have no influence on your minds, that it is your duty to dismiss from your consideration who the parties in this case are—that one is a foreigner, residing here in a public capacity, and the other a highly respectable citizen, occupying a prominent position in society. You should regard them as if A were the plaintiff and B the defendant, and be guided in your verdict entirely by the evidence laid before you. The plaintiff in this case comes into court and says it is not money he wants but the vindication of his character; and the defendant avers that the plaintiff did actually use the language which he charged him with using. The plaintiff complains of a charge made by the defendant in a letter addressed by him to His Excellency the Governor, which letter His Excellency has produced in court, and which I shall now read (here his lordship read the letter). This is the document of which the plaintiff in this action complains; and his counsel did not venture to assert, as he could not venture, that if the plaintiff did make use of the language there imputed to him he was unworthy to occupy the position which he held. If that had been said of me, sitting upon this Bench, I would deserve, if the charge were true, to be removed from my office, as one unworthy to sit upon the Bench and administer justice to Her Majesty's subjects in Her Majesty's name.

A few days after this letter was received by His Excellency, his private secretary, Mr. Coen, by His Excellency's directions, replied thereto. I shall now read that reply (here his Lordship read Mr. Coen's letter), some time afterwards Mr. Hoyles addressed a note to the defendant, which it is unnecessary to read, as it was a mere formal note, but the defendant's reply requires your consideration, as he asserts the claim which he now pleads that his official communications with the Government of the colony are privileged, (here his Lordship read the defendant's reply to Mr. Hoyles.) Now, it must be admitted that in the defendant's position, he must be privileged to make communications to the Governor of the colony, just as the Colonial Secretary who is in constant and confidential communication with the Governor, and as I myself, from the office I hold, am in frequent communication with His Excellency; and if I write slanders, which perhaps I sometimes do, and am privileged to do so, I am bound to take the utmost care to act solely from a

sense of duty, and to be most scrupulously careful to ascertain the truth of what I communicate. The defendant is here representing the Queen of Spain, and he has a right to make representations to the Government of matters affecting his Royal Mistress, or her subjects resorting to the island; but he must do so honestly; he must make his communications *bona fide*; he must not suffer himself to be actuated by malicious motives. Now, Gentlemen of the jury, if you believe the defendant to have acted solely from a sense of duty; if you believe the letter just read to be an honest, *bona fide* communication made in the discharge of his duty as the representative of the Queen of Spain, without malicious motive or personal feeling, he is entitled to your verdict; but if you believe him to have been actuated by any malicious motive towards the plaintiff he is not entitled. Now in coming to a conclusion on that matter, it would be well for you to bear in mind that two or three days after his letter to the Governor had been received, in which reference was made to time and circumstances, a reply was addressed to him, in which he was informed that His Excellency had caused enquiry to be made, and was satisfied that the words imputed by him to the plaintiff had not been used; that after some time had intervened and he was sued for libel, he placed upon the files of this court that he had stated that, and only stated that which was true. This is the second plea on which the defendant relies; and you will probably feel with the defendant and his counsel that the truth or falsity is the chief question; and if you are of opinion, from the evidence you have heard, that the defendant is not entitled to your verdict on the plea of the communication being privileged, you have to consider, from the evidence given on both sides, whether it is true that the plaintiff did make use of the words, "Damn your Queen." You have heard the letter read, and you have heard the evidence of Mr. Tobin and others for the defendant, and the evidence of the other commissioners and several other parties, to the effect that they did not hear him utter these words, and that from the position of the parties at the time, they believe they must have heard him had he done so. If you desire it I shall read the whole of this evidence to you.—[Two or three jurors having said it was unnecessary, his Lordship proceeded.] It is unnecessary for me to make any further observations. If you believe these words were uttered by the plaintiff, or if you are of opinion that the communication was privileged, it is your duty to find for the defendant; otherwise it is your duty to find

for the plaintiff; and should your verdict be for the plaintiff, I have to call your attention to the observations of the plaintiff's counsel, Mr. Hoyles, whose words I have taken down, that he does not look for damages. The amount of damages which should be given, in that case, is for your consideration.

The jury then retired.

After the jury retired, Mr. Pinsent rose and, addressing the court, said,—My Lord, in reference to an observation made by the court in the charge to the jury, I wish it to be understood, that I do not solely or chiefly rely on the plea of truth. There are two pleas on the record equally strong in justification, and each stands upon its own merits.

After some delay the court adjourned until eight o'clock in the evening.

Shortly after eight o'clock the court met again, and the jury being called in and asked if they had agreed? one of the jurors replied in the negative. A second juror then said, that where they differed was, nine of them took the evidence of Mr. Nugent, Mr. Tobin, and Mr. Nugent's son, and three did not.

The Chief Justice.—I told you in reference to the matter referred to by your brother juror, that whether the words were said or not is one of the questions for you to decide. Defendant alleges the plaintiff did use them—the fact is admitted that he was charged, and the defendant undertakes by his plea to prove it. It does not lie on the plaintiff to shew he did not; the defendant endeavours to sustain his plea by the evidence of Mr. Nugent, Mr. Tobin, and Mr. J. L. Nugent; he is bound to prove it to your satisfaction; the plea fails if not sustained by his evidence [reads the plea.] If he fails, he fails on the very defence on record. As the case stands at present, I'll consent to your immediate discharge if counsel on both sides will. I am not recommending such a course to them, they will follow their own judgment. I will do all I can to assist you by reading evidence, or in any other way. I would recall any witness if I could, but the case has been placed before you, and you are to deal with the evidence—I cannot direct you on that—I do not mean to insinuate that a pressure of any kind is put on the jury.

A Juror.—Nine of us think that the evidence for the plaintiff does not prove that the words were not said; they think that Mr. Carter's evidence came nearest; while the evidence of Mr. Nugent, Mr. Tobin and Mr. Nugent's son is clear and positive.

Chief Justice.—I would willingly assist if I were able; but I cannot; I can only repeat that I am ready to read the evidence of Mr. Nugent, Mr. Tobin and Mr. Nugent's son, and then it will be necessary to read the host of most respectable evidence on the rebutter, or if the learned counsel desire it, I will consent to your discharge

Mr. Hoyles, the counsel for the plaintiff, was in the act of rising when the court remanded the jury till nine o'clock.

In a few minutes the jury returned with a "verdict for defendant"

Mr. Hoyles, Q. C. ; The Attorney General and Mr. Carter, for plaintiff.

Mr. Pinsent for defendant.

IN RE WILL OF ELIZABETH HAYE.

1858, *January*. ROBINSON, J. ; LITTLE, J.

Will—Lost will—Setting aside letters ad colligendum—Establishing lost will, proof necessary.

Where some years previous to the death of the testatrix she had made and executed her last will, but it did not appear that the will, which was found to be lost, was in existence at or about the time of her death. On an application to set aside *letters ad colligendum* and establish the lost will, the proof of its contents was given by the party having the custody of it previous to its loss, which was corroborated by another witness who swore to having heard of its contents from the testatrix.

Held—It is not necessary in order to establish a lost will that its contents should have been read and remembered by two witnesses. One witness is sufficient if corroborated on material points.

In this case proof of the alleged will of the late Elizabeth Hays was contested by next of kin. The case was that of a lost will, and in support of it the promovents called—

Mr. George Anderson—Who deposed to his intimate knowledge of deceased; she died in 1856, aged about 76. In 1851 a paper writing had been left in his possession; it was in the handwriting of the late Harcourt Mooney, Esq., who had been professional adviser of deceased; witness had frequently acted as agent for deceased—unpaid agent. Miss Hays brought the

document to witness's house and left it there in 1851; not considering it of great value, witness threw it carelessly or rather put it into the table drawer in parlor; did not recollect any subsequent reference to it; believed he often saw it; does not reside in same house now; had not seen the will since deceased's death; he had searched every trunk and drawer and inquired of relatives; it bore the signature of Miss Hays the testatrix, and of Harcourt Mooney as witness. The words, as nearly as he could remember, were "This is the last will and testament of me, Elizabeth Hays, of St. John's, spinster; I give and bequeath to Elizabeth Anderson, daughter of George Anderson, and to Mary Ann Winter, daughter of Ann Winter, all the property of which I may die possessed or be entitled to"; (these words may have been there or not). I do not remember any date; no executor named. Miss Hays was first cousin of Mary Ann Winter's mother, and Elizabeth Anderson's godmother; the latter is dead—died before Miss Hays; witness makes no claim under will. It is only lately, for the first time since testator died, that promovent, Mary Ann Winter (now Furneaux), had been in St. John's. Always considered testatrix very clever, shrewd woman; reason enough to make will or do anything; she was perfectly sane; was in the habit of seeing and visiting her frequently; understood from deceased that she was on bad terms with her sister, the impugnent; could not recollect deceased ever saying that she made a will; witness did not know who brought the will to the house; had no other paper of deceased; was in the habit of being consulted about business.

Cross-examined—Had no recollection of ever hearing deceased say she was going to make or had made a will; believed the will was not in existence at time of testator's death; does not know he ever saw deceased write, but had no doubt of signature; knew her handwriting from communications; cannot swear that there was any subscribing witness; does not know of any reason for her leaving property as she did; the words "at the time of her death" were in the will; cannot say whether will was in a locked or unlocked drawer, if in latter, as deceased was in habit of paying frequent visits to my house, she might have got it; never heard her say she revoked it—never heard her say anything about it.

Re-examined—I swear that without the privity or consent of testatrix the will was lost; she never had had any means, to my knowledge, of handling the will.

Miss Phillips, called and sworn—Deposed to deceased telling her that she had divided her property between Mary Ann Winter and Elizabeth Anderson by a document; considered her sane in mind; she had flighty romantic habits, something eccentric, but understood how to manage her own affairs; her brother was insane.

Mr. Pinsent, for next of kin, contended at considerable length upon the insufficiency of the testimony in support of the execution of the will, the want of evidence of its existence after testatrix death, and so forth, and submitted that upon the authority of Swinburne, the evidence of two unexceptionable witnesses who had seen and read the will, and could depose to its contents, was necessary in the case; and also called several witnesses in proof of insanity, and of the promises of deceased to leave the property to several other parties.

Mr. Carter called witnesses on a rebutter case, and addressed the Court.

The Court took time to consider.

On a subsequent day the following judgment was delivered:

In this application for probate the judges did not dispose of the case at the time on account of any doubt with regard to the satisfactory character of the evidence in support of the will, but as to its sufficiency. It was an application to set aside letters *ad colligendum*, and to establish a lost will by affidavit; it is obvious that courts should require the greatest accuracy of proof to induce them to do that which might be made an engine of so much injury and fraud, particularly when the statute of distributions makes so wise a disposition of property for those who fail to leave a will. It is incumbent on Court not to encourage carelessness and recklessness, and not to disturb the statute except in very clear cases; and doubts were raised by the impugnants upon the testimony in this case—Mr. Justice Little was satisfied, as I am now, of the sufficiency as well as of the satisfactory nature of the testimony. Mr. Anderson, the first witness, had no interest, his testimony was clear, and we are not only satisfied as to his integrity, but also as to his memory and clearness; his evidence is materially corroborated by another witness, to whom the contents of the will were stated by the testatrix. Anderson had read the will and distinctly remembered its contents; he had been well acquainted with testatrix, transacted business for her, and was frequently visited by her; he found himself in possession of the will, and

supposes it was left for safe custody; it has been drawn by a barrister—the late H. Mooney, Esq.,—in due form and very short. I think the Court may take judicial notice that Mr. Anderson's position gives him a better knowledge of the nature of these transactions than ordinary persons have. We are thoroughly convinced that proof of the will is complete. A doubt was raised upon the authority in *Swinburne* as to the sufficiency of the evidence, in the absence of proof, of two unexceptionable witnesses having read and remembered the contents. Mr. Pinsent argued forcibly that it was impossible to get over the authority, and urged its propriety. Mr. Carter, on the other hand, produced no authority which negated that one—nothing to shew that, if the Court were otherwise satisfied, it could act. But we (the judges) find an authority to that effect. (Here His Lordship read from *Williams on Executors*, 5th ed., p. 306). In addition to this we have also an adjudicated case in the Supreme Court, viz., *Callahan's Will* to the same effect. We think we are coerced to establish the will in the following form: "This is the last will and testament of me, Elizabeth Haye, of St. John's, spinster; I give and bequeath to Elizabeth Anderson, daughter of George Anderson, and to Mary Ann Winter, daughter of Ann Winter, all the property of which I may die possessed or be entitled to." Administration being also granted to the applicant on security being given, as in *Valance v. Valance*, 6 *Haggard*. We have not overlooked the proof which was given of the alleged insanity of the testatrix, we do not think that that proof carries with it more than evidence of eccentricity. If peculiarity in dress and speech, and flightiness of manner, were regarded as evidence of insanity, the range of that disease would be much greater than it is now allowed to be. The testatrix had a keen perception of her rights, and the manner of making her will does not show the contrary; the only next of kin seeking to disturb it is her sister who was on bad terms with her, and latterly did not visit her. With regard to costs, we think they should not be allowed to the impugners out of estate, as they went too far in attempting to prove insanity.

Mr. Justice Little concurred with Judge Robinson, and, as to costs, was of opinion that the winning party should always be paid his costs.

Mr. Carter for legatee.

Mr. Pinsent for next of kin.

1858, *January*. HON. SIR F. BRADY, C. J.

Shipping—Bill of Exchange—Written acceptance—Application of 2 Geo. 4.

The statute which requires a written acceptance of an inland bill of exchange applies to Newfoundland.

Mr. Robinson, Q. C., for plaintiff, shews cause to a rule *nisi* obtained by Mr. Hoyles, Q. C., for defendant to enter judgment for defendant, or have a new trial upon the ground that there was no written acceptance by the defendant of the bill of exchange upon which the action was brought. This was an action of assumpsit for £52 12s. 0d. amount of an order drawn by one Aylward in favor of plaintiff on defendant and promised by her (defendant) to be paid; small sums had been paid on it. There was a count in the declaration on account stated. Mr. Robinson contended that the statute 1, 2, George 4, which requires written acceptance of inland bill was not applicable to Newfoundland, the peculiar circumstances of the country, the scarcity of roads, defective postal arrangements, and the want of other facilities for paper transactions forbade its applicability.

Cites—Baley on Bills, 26, 174, as to meaning and description of inland bills, and where, under certain circumstances, the statute referred to applies only to England—Bentley v. Northhouse as to extension of 3 & 4 Ann, to Scotland; 1, Chalmers's Opinions, 198, as to meaning of the word "Kingdom," and page 200, word "Dominion" explained.—Clarke's Colonial Law, p. 8. The evidence given was sufficient to support the action upon the count stated.—2, Starkie on evidence, 75; Bayley, 358. The Chief Justice makes rule absolute; he could not recognise the principle that so much of the commercial law had not been introduced here.

The Court then rose.

1853, *January*. HON. SIR F. PRADY, C. J.

Practice—New trial—Improper rejection of evidence.

In an action on the case for obstructing certain water privileges, evidence of a declaration by the defendant's wife to a party when possessed of the premises in question, was excluded at the trial. On a rule for a new trial,

Held—The evidence was improperly excluded. New trial granted.

THIS was an action on the case for obstructing water privileges, tried during the general sitting of the last Central Circuit Court, wherein a verdict for nominal damages was found for the plaintiff. Defendant's counsel subsequently obtained a rule nisi to have the verdict in the cause set aside, and a nonsuit entered on the points reserved at the trial, namely, "that the plaintiff was not possessed of the easement claimed by him, and that the evidence of declaration made by Mrs. Barron to W. Prowse when possessed of the premises in question, was improperly excluded. To this rule Mr. Robinson now shewed cause, contending that the plaintiff (Eagan) derived his title from a third party." Defendant is tenant of the premises held by him and claims under DesBarres—both premises are contiguous; the plaintiff established an exclusive right to the water privileges in question by user, and also put in his title deeds under which he claimed a right and title. Mr. Robinson contended that supposing title deed be defective in any particular, it is competent for plaintiff to fall back on user—*1 Bac Ab. 102*. If declaration allege generally that plaintiff was lawfully possessed, &c., user is sufficient against a wrong doer.

(Chief Justice—Plaintiff is a lessee, and Mr. Hoyles contends that user might be good for lessor, but not for lessee unless lease expressly gives it.)

Mr. Robinson.—Court will give effect to whole of deed.—*4, Moore, 448, 2 B. & B. 38, 1 Term Reports; 638, Holland v. East India Co.* If any word material be omitted, and other words cannot be explained or have their proper effect without the introduction of such word omitted, the Court will construe as if that word were introduced.—*White v. Dickson, 1 Dowling, 141*. The word "premises" gives every privilege the lessor had. A conveyance of land will pass running water, (*Crom. v. Jervis, 1, 126*) much more would it pass the right of using the water in question. If any omission was in lease to plaintiff, it was an inaccuracy; as the context shows that it was manifestly the intention to give all, and intention will be construed by all the circumstances of the case. If a party buys

land, and to that water be appurtenant, it goes without express mention in the deed.—*2 B. & C. 910*, also Coke upon *Littleton*. A grant of land carries water, even supposing the conveyance be silent as to water.—*2 C. & Jervis*. All things appurtenant to a manor will pass without the words “cum appurtenantibus”—here the water was an easement always used, and although the word “water” did not appear in the deed, still it goes; the court will look at whole of document and construe accordingly. As to the meaning of word “lease” and construction thereof, the learned counsel referred to *Woodfall*, 56-57; “land” or “ground” passes all without “cum appurtenantibus.” It is not for third party as defendant to come in and interfere between plaintiff and his landlord as to plaintiff’s title, the landlord not denying right.—*Mortimer v MacMullin*, 4th Juris, 172; *Bacon v Rae*, 2; *Russel*, 63.

Mr. Hoyles, contra.—The plaintiff has no such easement as that sought to be claimed by his learned friend; the term “bounded” in the description of the premises leased, excludes the water as it would the public street

Chief Justice—What do parties mean by the “land and its appurtenances.”

Mr. Hoyles.—“Appurtenances” mean the buildings, drains, &c.

Chief Justice—Would a right of way go under the lease?

Mr. Hoyles.—If general terms of the lease were so, it would pass; here the word “appurtenances” means such as can be repaired, and is not a general term; the covenant is governed by the grant. In the covenant to surrender, the words “demised premises” only, without “appurtenances,” appear, which shew that appurtenances claimed here did not go nor was it the intention of the parties that they should. The case *1 Dou*, 741, cited by his learned friend as to supplying the omission of a material word does not apply here. *Burn* and *C. 910*, also cited, applies only to running water; here the question at issue is a water privilege in the harbor. The declaration of a party is admissible as evidence to shew that one has not the right he or she claims—*Daw v. Hen.*, Addl. and Al. 67; *Woolingway v. Row*, 1, Addl. and Ellis, 113; *1 Espinas*, 158; *5 Barr and All.*, 223.—*C. A. V.*

On a subsequent day the Court ordered a new trial on the grounds of the improper exclusion of Mr. Prowse’s evidence.

Mr. Robinson, Q. C., for plaintiff.

Attorney General and Mr. Hoyles, Q. C., for defendant.

1858, *January*. HON. SIR F. BRADY, C. J.

Practice—Demurrer—Award.

Not using the word "award" in an agreement for submission to arbitration, does not alter the legal effect of the agreement or the submission.

THIS was an action of assumpsit brought upon an agreement by which the defendants undertook, in consideration of the plaintiff's giving up to them their goods laden on board a certain vessel, to pay their share of the general average, the adjustment of which average they referred to Robert Prowse—the declaration, averred the delivery of the goods, the adjustment of the average, and non-payment by defendants.

Plea 1—General issue; 2—Prowse did not adjust according to terms of the agreement, and according to law.

Demurrer—Upon the grounds that it was not competent for defendants to dispute Prowse's adjustment, and that the second plea amounts to the general issue

Mr. Hoyles supported the demurrer. The parties had referred the question of adjustment to Mr. Prowse—this was a question that depended upon the peculiar circumstances of every case—unless there were fraud practised neither of the parties was in a position to except to the adjustment; if fraud were imputed this was not the proper course. If the terms of the agreement had not been observed it could be put in evidence under the general issue—and this plea if it meant that was bad for it then amounted to the general issue.

Attorney General, *contra*. The agreement provided in a reference for adjustment rateably and in fair proportions that in according to law which established certain rules which the defendants say were not observed here. The plea is one in the nature of "no award." Plaintiff should have relied by setting out award with verification—that the defendant might shew that the award was void in law. The introduction of the words "according to law" were surplusage as not open to objection. As to the plea being bad as amounting to the general issue—the defendants plead in this way to avoid the effect of the improper adjustment, to narrow the issue which the Court would favor, if the plea were confined to the general issue the question of the invalidity of the award could not be raised, it does not follow because the plea amounts to general issue that it cannot be pleaded specially.

Cites:—*Russell on Awards*, 506, &c.—*Watson*; *Dresser vs. Stansfield*, 14, M. & W. 822; *Gisborne vs. Hart*, 6, M. & W. 4, B. & C. 547; *Chitty on Pleading*, 580, 2, H. B. 182; *Fisher vs. Tinley*, 11, E. 188.

On a subsequent day the following judgment was delivered:

The Chief Justice: This was an action of assumpsit upon an agreement; and came before the Court upon a demurrer to the second plea. There can be no doubt that the agreement in this case was an agreement to submit, or as it is technically called a submission of the differences between the parties to the arbitration of Mr. Prowse, for in that agreement, as set forth in the declaration, the words used are "agree to refer the amount and proportion (of the expenses) to be ascertained and adjusted by Robert Prowse," &c. The word "award" is not used in it, but that cannot alter the legal effect of the agreement to submit, or the submission. The declaration then alleges "that the said Robert Prowse, did then and there (not award) but ascertain and adjust the amount and proportion aforesaid, to be paid by said parties of the second part." To this averment the defendants pleaded that "the said Robert Prowse did not ascertain and adjust the amount and proportion of said (expenses), &c., to be paid by the defendants, or the said parties of the second part according to the terms of said agreement, and the law in such case made and provided, and so referred as aforesaid in manner and form," &c. This is to all intents and purposes in law a plea of "no award" which means no *legal* or *valid* award. *Gisborne vs. Hart*, 5 *mees*, and W. 50, and *Dresser vs. Stansfield*, 14 *mees*, and W. 822. The only distinction between these two cases is that following the words of the agreement and of the declaration in this case, the plea uses the words "ascertain and adjust," instead of the word "award." Then as to the words "according to the law in such cases made and provided," if they were introduced into the common plea of "no award," they would be mere surplussage, as expressing what is implied in the words "no award," which as I have already said, means no *legal* or *valid* award, or no award "according to law," and they have no other effect in the plea in this case, and cannot affect the validity of the plea. On these grounds, we are of opinion that the demurrer to the plea in this case must be overruled.

Mr. Hoyles for plaintiff.

Attorney General for defendant.

1858, *January*. BRADY, C J.; LITTLE, J.; ROBINSON, J.

Shipping—General average—Vessel driven on shore—Re-shipping cargo—Expenses—Contribution.

A vessel on a voyage from St. John's to Montreal was abandoned by her crew, and subsequently boarded again and towed into port and secured. It became necessary to discharge her cargo in order to repair her, which led to her being frozen up for the winter. The cargo, in the meantime, there being no stores, was covered up on the beach with the vessel's sails. On the opening of spring cargo was re-shipped and brought to its destination. The defendant, being part owner of the cargo, declined to pay any contribution towards general average, as the ship was driven on shore, and the loss which occasioned the expenditure on ship and cargo arose from the ordinary perils of the sea, and not through the agency of man.

Held—That where a ship is obliged to go into port for the benefit of the whole concern, the charges of unloading and reloading the cargo and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average.

ACTION of assumpsit for £228 2s. 6d. cy., money paid by plaintiff for and on account of the defendant. The plaintiff was master of the brigantine *Jane*, a vessel on her voyage from the St. Lawrence to this port; most of her cargo was for the defendants; on the passage she encountered a very severe gale, which obliged her crew to abandon her, but they subsequently regained her; surveyors were called in who advised captain to discharge cargo where the vessel lay at Point Vauche, and save the rigging; the captain, however, determined to make an effort to save the cargo, knowing the sacrifice it would necessarily be subject to if discharged and sold there; he laid up the vessel for the winter, and succeeded, after repairing her, in bringing her safely to this port. In order to defray expenses necessarily incurred in repairing, &c., the vessel, it was necessary to resort to a general average, that is, that a general contribution should be assessed upon the different owners of the cargo in proportion to their respective interests. A bond to pay general average was accordingly drawn up and signed by defendants, whereby Robert Prowse, Esq., was appointed referee to apportion the liabilities of the parties to the bond. The claim was now brought for the recovery of the amount awarded against defendant by Mr. Prowse, with interest from date of award. It was contended by plaintiff that Mr. Prowse's statement could not be disputed, and, if it could, that the statement drawn up was in every respect correct.

Mr. Prowse was then called and sworn, who deposed to his having drawn up the average statement in question, and as to Messrs. Cusack's liability for the sum awarded against them, he did not take freight into consideration in making up statement—the gross amount of freight was £167.

Mr. Mare was also examined.

The Attorney General moved for a non-suit as the plaintiffs had not signed the agreement of submission, and in the absence of such evidence of assent to the submission, there was no mutuality in it and no authority on the part of the average stater to adjust the average contribution.—Reserved. Attorney General also submitted that the average statement was incorrectly made up; that among other items there was a sum of £259 4s., which was charged on the face of the statement under the head of general average, which was incorrect, being chiefly for the wages and provisions of the captain and crew for five and a half months, while the vessel was frozen up in the River St. Lawrence, and for temporary repairs to the vessel—that as the primary cause of the ship's detention arose from the ordinary perils of the voyage and not from any extraordinary sacrifice made for the common safety of ship and cargo, and as the master and crew were bound to stay by the ship, and the cargo being landed, it was therefore wrong to charge their wages and support as a general average item; he referred to several authorities in support of these points—2 *Arnold on Insurance*, 906; *Bailley on av.*, 80, &c.

Chief Justice—Suppose we send this case to the jury to assess and find what they really ought to allow for the expenses at Point Vauche, such verdict to be subject to any reductions we may hereafter think are not fairly chargeable.

Attorney General consents.

Mr. Hoyles thinks there is some difficulty.

Court—Before coming to our decision we will see Mr. Prowse and Mr. Mare in Chambers, provided counsel consent to this case going to the jury. As to the objected item chargeable against defendant for seamen's wages, support and maintenance at Point Vauche, that will also enter into our consideration. The point as to want of mutuality in the submission to Mr. Prowse will also be reserved, as also the question of interest. Counsel consenting. Jury returned a verdict for the plaintiff, £228 8s. 6d. currency, subject to reduction by the Court, and to the point reserved for non-suit.

On a subsequent day the following rule was argued :

Mr. Hoyles shewed cause to the following rule:—"Upon hearing Mr. Hoyles for plaintiff and the Attorney General for defendant, it is ordered that the plaintiff be non-suited on the points reserved—the plaintiff not having signed the average bond of submission given in evidence—unless cause be shewn in four days, and if so much of this rule be discharged, and if the Court shall be of opinion that it was not competent for the defendant to contest by evidence the correctness of Mr. Prowse's statement, or if the objection to such evidence was not duly taken, then in either of such cases the amount of the verdict shall be reduced by such sums as may appear to the Court to be reasonable upon reviewing this case, and, if necessary, to examine on oath Mr. Prowse and Mr. Mare."

Mr. Hoyles—As to the question of signature, it is sufficient, if the party to be bound signs, a party may be sued upon an implied agreement arising from adoption. The defendant here gets his goods and turns round and repudiates his part of the agreement. The agreement is an executed one so far as plaintiff is concerned, he gave up the goods, it remains for defendant to pay the award. In an action on an indenture signed by one party only the other may be sued on his implied covenant.—*Woodfall*, 603; *Foster v. Mapis*, *Clo. Eliz.* 212; *Abbott*, 306-7. As to the question of the right of defendant to dispute the award, it is incompetent for him to do so. There are several parties to the submission, all pay but defendant. If the defendant in this case should not be held to be bound by it, to whom is the captain to look for contribution? he will have to pay it himself. No master or owner would place himself in that position, he would prefer holding on to the goods. The parties have determined on their mode of adjustment and are bound by the agreement, an arrangement by which one party gives up an advantage by receiving another advantage. Here the matter is referred to one in whose skill and integrity the parties place confidence, and they agreed to be bound by the result—the Court would not interfere if it had the power; it has not the power. In the case of arbitration the Court would refuse to interfere in a mercantile case where the arbitrator is a merchant—*Watson*, 291. If corruption in the arbitrator were proved, it would be no defence at law, but in equity only. The Court will not interfere with the judgment of the arbitrator, that would be destroying the object of the submission.

The learned counsel cited from *Watson on awards*—Roscoe's evidence, *Johnson vs. Durant, B. & Adol.*

Attorney General—In support of the rule, there are two questions, one that M. Prowse has not made a proper average statement; secondly, there is no mutuality in the agreement, and it is void—*nudum pactum*. Giving up lien does not obviate the necessity of a binding contract—*Roscoe, 116*. It is necessary to prove proper submission as well as the award itself—*Russell, 50, Peake R., 227, 6 B. & C., 255, 7 B. & C., 427, 15 East, 208*. By declaring on the award plaintiff takes on himself the onus of proof of the submission—*1 C. M. & K., 681; Dresser vs. Stansfield, 14 M. & W., 822*. The arbitrator did not award in manner and form as agreed, there is no award therefore. The arbitrator has gone beyond the submission, his award is not conformable with it—this is shewn by matters apparent on the face of it, and in papers referred to in it—*Russell on awards, 298, 308*. If the award is law in part, and that is inseparable from the rest, the whole is destroyed—*Power vs. Whitmore, M. & S., 909*. An award is open to exception for mistake. Here Attorney General took up the various items to which he objected, contending that by law they did not form general average charges, when he was stopped by the Court, who said they would consider the general points first, and if of opinion that it was competent to except to the award they would go minutely into the particular charges.

* * * * *

JUDGE ROBINSON delivered the following judgment:—

This is an action of assumpsit brought by the plaintiff, who was master of the *Jane*, against the defendants who were the owners of part of the cargo on board that vessel, to recover their proportion of contribution to an alleged general average loss. The case was tried during the last term, and a verdict was taken for the plaintiff for the sum of £228 2s. 6d. currency, subject to be reduced in case the Court should be of opinion that the charges made against the goods of the defendants were not in whole or in part properly the subject of a general average under the circumstances. The facts appear from the documents in evidence to be substantially as follows:—The ship was bound on a voyage from Montreal to St. John's in November, 1856; in coming down the St. Lawrence she experienced a heavy gale, during which she struck upon Port Neuf Shoals, where, being in imminent danger, the crew abandoned her near the Bay de

Vuille Vaches; on the following morning the crew found that the vessel had, during the night been driven near the shoals, they accordingly boarded her again, and towed her into the bay where they secured her. It became necessary to discharge the cargo in order partially to repair the vessel to enable her to proceed on her voyage, which was done, but before the repairs could be effected, and the cargo reshipped, the frost set in and the ship was frozen up and detained until May following; there were no stores to be had in which the cargo could be placed, so it was secured and covered on the beach, by the vessel's sails, and preserved by the crew who remained during the winter to watch it. On the opening of spring the cargo was re-shipped and brought to its destination; on its arrival in St. John's the defendants were desirous of receiving their goods, and they were delivered to them by the plaintiff, upon the defendants entering into a written agreement in which they undertook, "in consideration of the plaintiff delivering to them the said goods, that they would pay him their proper proportions of the general average, loss, and expenses, to which they should be found liable, and for the better computing of the same, they agreed to refer the amount and proportion thereof to be ascertained and adjusted by Robert Prowse, of St. John's, Notary Public, whose decision in the premises they engaged to abide by and perform." On the faith of that agreement the plaintiff delivered up to the defendants their goods—the general average statement was prepared by Mr Prowse, who adjusted the defendants' proportion at £228 2s. 6d., and to recover that amount the action was brought. The Court having already determined that the said agreement did not absolutely conclude the defendants, the only question for me to consider is whether the principles upon which Mr. Prowse based the average statement are legally correct, for I conceive that where both parties have deputed a particular notary to make the calculations and have undertaken to abide by his decision; and one party on the faith of that undertaking has performed his part of the agreement, it would require stronger reasons than are attempted to be urged here to justify the Court in re-opening the details, or questioning the arithmetical accuracy of the computation of the referee so selected and empowered. The learned counsel for the plaintiff, Mr. Hoyles, has stated and urged that the other parties who had signed the average agreement had paid their proportions thereupon, but I think that as they were not the keepers of the defendants' rights, the defendants should not be in any

way prejudiced by their acts, and if they, Messrs. Cusack, conceive they have any valid ground for contesting the plaintiff's claim, those grounds ought to be considered irrespective of what others pleased to do. The learned counsel for the defendant, Mr. Little, clearly raises the points on which he relies, and contends, 1st—That the defendants are not liable to any contribution to general average, because the ship having been driven ashore by the force of the winds, the loss which occasioned the expenditure on the cargo and ship, arose from the ordinary perils of the seas, and not through the agency of man; and 2nd—That at all events, only such portion of the expenses of and for the crew during the winter can be charged to general average, as the storage of the cargo would amount to, which would be about £100. It is undoubtedly clear law, as contended for by Mr Little, that a general average contribution can only be required where loss or expenses have been voluntarily incurred by the mind and agency of man for the benefit of the whole; and that an involuntary damage occasioned by the ordinary perils of the seas must fall solely on the ship. The application of this principle to facts which are sometimes intricate often occasions difficulty. In *Power vs. Whitmore*, 4 M. & S., 141, (which arose in consequence of the ship springing her bowsprit, and in which the cargo was not discharged, or touched), Lord Ellenborough rules that "general average must lay its foundation in a sacrifice of part for the sake of the rest." Lord Tenterden in his treatise on shipping, *Abb. 497*, lays it down, "that where damage is incurred by the mere violence of the wind and weather, without any sacrifice on the part of the owners for the benefit of all concerned—such damage, with the expenses consequent upon it, must fall on the ship alone." Whilst he admits that if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port charges, wages, and provisions during her stay, are to be considered as general average. The doctrine is more comprehensively stated by *Arnold*, p. 904, where it is laid down, that contribution "to general average must be a necessary consequence of an extraordinary measure taken for the general preservation." In *Birkley vs. Resgrave*, 1 E. 220, Mr Justice Lawrence lays down the law that "all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average." *Stevens on ever-*

ages, p. 29, states that where a master voluntarily runs a ship on shore for the sake of the whole, it is the practice to allow the expenses in general average (although he questions the propriety of that practice). and in *Abbott*, p. 490, it is stated that if the master, for the preservation of the cargo, puts the ship ashore, and the ship be afterwards got off, the damage thus done to ship and cargo, and the expense of recovering and unloading her, &c., to enable her to continue her voyage for the benefit of all concerned are properly general average." Now it is not easy to perceive what difference there is in principle between voluntarily putting the cargo ashore, and voluntarily putting the ship ashore, the object in both cases being the common benefit. Apply then each clause of *Arnold's* definition to the circumstances in this case, the landing of the cargo was an extraordinary measure, *i. e.*, out of the ordinary course—the use of the ship's sails to cover it on the beach was not their ordinary use, the employment of the crew on the land to watch it during a winter was not their ordinary employment—all these measures were voluntarily taken, they are admitted to have been necessary, they were done for the benefit of all, and resulted in a common average. Mr. Little argues that all the expenses must be regarded with reference to the primary damage, and that if the first loss could not be made the subject of general average, no repairs or expenses consequent thereupon can; that is true to a certain extent. In *Arnold* there are two distinct heads under which average contributions are classed—where a sacrifice was made, and where an expenditure was incurred. In *Plummer vs. Wildham*, 3 M. & S., a ship suffered damage by collision—the master in consequence cut away some of his rigging and was obliged to return to port to refit; the cost of loading and unloading the cargo, the wages and provisions of the crew, (but not the master) and the amount of repairs, were made the subject of general average. Now, let it be observed that in that case the primary damage would not be the subject of general average, but the subsequent and voluntary act of cutting away would be, and Lord Ellenborough says, "if the return to port was necessary for the general safety of the whole concern, the expenses unavoidably incurred by such necessity might be considered as a general average; it is not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements, or the collision of another ship, as whether the effect produced was such as to incapacitate, without endangering the whole concern from further

prosecuting her voyage, unless she returned to port, and removed the impediment; as far as removing the incapacity is concerned, all are equally benefited by it, and therefore it seems reasonable that all should contribute to the expense of it."—In *DeCosta vs. Newnham*, 2 S. K., 407, it was held "that where a ship is obliged to go into port for the benefit of the whole concern, the charges of unloading and reloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs became general average." In the case of the *Copenhagen* in the Admiralty Court, the ship went into port in distress, and wanting repairs, it became necessary to take out cargo, and there being no warehouses at hand, it was put on board other vessels. Lord Stowell held "that as the unloading of the goods was for the common benefit of all, it being necessary to unload the ship for the preservation of the cargo as well as for its own repairs, the expense incurred by it must be considered as a general rule." Mr. Little further contended that the ship in this case, having been driven ashore against the will of the master, the element of a voluntary sacrifice, which is an indispensable ingredient in general average, is wanting, but without giving undue weight to the fact that the ship was, after she had been driven ashore towed into Bay Mille Vaches; the grounds on which a general contribution is here sought are, the subsequent voluntary and necessary discharge of the cargo and the measures taken to preserve it, and the detention of the crew to watch it during the winter. I am far from saying that the present case is free from difficulties; there are decisions upon the point which appear to conflict with each other, and turn upon nice distinctions; very high authorities, both in England and America, are somewhat disagreed thereupon, and I am, or rather the parties are, unfortunately deprived of the assistance of the Chief Justice and Mr. Justice Little, whose learning at all times valuable, would have been especially serviceable to me in a case involved in so much intricacy as the present. Steering, however, through these conflicting authorities, taking as my guide the broad principles which govern general averages, and applying them to the circumstances of this case, I arrive at the conclusion that none of the cases cited for the defendants are irreconcilable with the plaintiff's right to recover, and that the adjustment has been made with one exception, upon the proper basis; that exception is the master's wages, and I think that there is a manifest error in charging the cargo to any extent with the master's wages or expenses at Mille Vaches—

his presence was indispensable to the ship, whether she was ashore or afloat, and whether she had or had not a cargo, it was his duty to remain there, and take care of the property confided to his care, and the verdict must be reduced by the amount charged under that head.

Let judgment be entered for the plaintiff for the sum of £22S 2s 6d., less the amount charged on account of the captain's wages and expenses, and let this rule be, as to the rest, discharged.

Mr. Hoyles for plaintiff.

Attorney General and *Mr. Little* for defendant.

BACON v. YOUNG.

1858, *January*. HON. MR JUSTICE ROBINSON.

Husband and wife—Wife carrying on business, and treated as feme sole—Ratification by husband of wife's contracts.

To bind the husband and make him liable for the contracts of his wife express assent is not necessary—his assent may be implied. The question of ratification by the husband is one purely for the jury.

THIS was an action of assumpsit to recover £27 18s. 4d., balance alleged to be due on a claim of £50, as agent and superintendent for one year from April, 1857, to April, 1858, of a millinery and dressmaking establishment, in the absence of the principal, Mrs. Young, wife of defendant. Plaintiff had previously been forewoman, at £20 a year, with promise of increase. Mr. Pinsent opened the case at considerable length, commenting strongly upon the supposed character of the defence, viz., repudiation by defendant of his liability on the contracts of the wife, while at the same time the law precluded creditors from seizing the wife: and the defendant in this case, although never in this community until the month of March last, had, upon his arrival, having left his wife in England, taken up his abode at the establishment, examined the books, assumed the property, endeavoured to collect the debts, received small sums of money, sold several articles, and taken upon himself to discharge the plaintiff, but refused to pay wages, &c. The plaintiff and several witnesses were called and sworn, and deposed to a variety of facts to establish the defendant's liability.

Mr. Carter moved for a nonsuit, (points reserved) and then addressed the jury, contending that Mrs. Young was the party to whom credit was originally given, with whom the contract was entered into, that there was no legal or moral obligation on the part of the defendant to pay; no promise, express or implied, the wife being a sole trader, and adverted to the hardship of the case upon defendant, &c; also contended that the sum charged was exorbitant, and that plaintiff had not accounted for what she had received, and called the defendant to prove the defence. Mr. Pinsent went to the jury, when,

Mr. Justice DesBarres charged them. Gentlemen of the jury: This is an action for wages as superintendent of a millinery and dressmaking establishment from April, 1857, to April, 1858. There does not appear to have been any agreement made as to wages. If we were to say that the old agreement were to continue in force until a new agreement it would be impossible to get over it. The only conversation was about entering into partnership, which plaintiff declined. She afterwards wanted wages fixed without any agreement being made, she had twenty pounds a year Mrs. Young was expected back—there was no perfect understanding—the business was conducted by plaintiff while these parties were at home. I cannot see how the running agreement for twenty pounds can be broken. Seventy-five pounds is proved to be given in a large establishment—Steer & Ayre's—men of large capital at hand; whereas this is an establishment in a bye-street, I suppose—she says it was in debt when she took the management; in this case you would not give the plaintiff as much—she was a little of everything, made herself generally useful, I suppose; kept the beds all right; was there to keep things quiet; it is very difficult for us to assess the damages—we are not acquainted with the needle—these things are very valuable articles, perhaps, but to say how much we are going to give, I don't know—they might have pasted instead of stitching, for what we know. Why didn't they settle these matters when she came back? how can we assess the damages? There is a great difficulty in assessing whether it shall be fifty pounds or twenty pounds—we have nothing upon oath more than the twenty. That is the way the case stands; I can say no more on this. Then comes the question about liability on the contracts. It is ridiculous to say he is liable for the wife's debts.

Mr. Pinsent: That is the reserved point, my Lord.

Judge DesBarres: I know of no reserved points—of no understanding about points, except about the reading of this note that has been put in. It is ridiculous, gentlemen of the jury, to say you are going to let your wife set up a shop and laugh at you; you would be annoyed at her, but you would have the upper hand. *If she goes and carries on business separate and distinct, he is not liable* Where they live together, and he has a part of all the little things that are brought into the house, he gets his share and is liable. If he is not co-habiting, he is only liable for necessities, it is his duty to supply her with them. The defendant is only accountable since he came out. It is a question of law, gentlemen, and I would rather say direct that he is not liable; it is a shame for the creditors, and I hope no gentleman will advise them to take an oath about their debts; I have great doubts about it; I would not do it for five hundred thousand pounds, I would rather throw the paltry case to the wind; I could not sleep sound, these creditors might; you know the evidence, you will say if the party is liable, and how much due, that's all we can do, we don't know what they claim, I am sorry for it, but when you bring people to find a verdict upon their oaths, they are bound to say the truth. Now, there is the £13 5s. and the £27. what's become of the difference? She says she spent it about the business and the house, but she ought to account for it. I don't know how you can give her a verdict. It is for you to make up your minds, without knocking about the law. I don't think there is sufficient to bring it home to defendant—his wife, he says, came against his will, and he had nothing to do with it. Miss Bacon ought to have gone and caught Mrs. Young before she left. He was not here. Why did not the creditors take care of the place, instead of leaving it with thirteen or fourteen different people, and watch it like a hen would her chickens? They allow everything to go. Gentlemen go and settle the business.

By one of the jury—Would your Lordship direct us what the law is when the husband assumes the property, and the direction, and collects the debts.

Mr. Pinsent—With all submission—are not the facts as proven for the jury?

Mr. Carter—Yes; the facts, but not the law.

Judge DesBarres—I can't say any more, it is in your hands. Verdict for the plaintiff, £17 18s. 8d.

On a subsequent day the case came on before the Supreme Court on appeal from the Central Circuit Court.

This case had been tried in the Central Circuit Court before Mr. Justice DesBarres (as per report of May 26). The plaintiff obtained a verdict for £17 18s. 8d. Mr. Carter subsequently obtained a rule returnable into the Supreme Court to show cause why judgment of nonsuit should not be entered against the plaintiff upon the points reserved, or why there should not be a new trial on the ground that the verdict was contrary to evidence. The evidence given on the trial of the case was as follows:—

Miss Bacon, called and sworn—Was plaintiff in the action; she proved her going into the service of Mrs. Young about two years ago as forewoman at £20 per annum, with promise of increase in wages. In April, 1857, Mrs. Young left for England, purposing to return in two months; the time elapsed, and plaintiff finding she did not return, wrote to her to fix salary; Mrs. Young did not reply to this part of her letter, but wrote several letters desiring plaintiff to continue the establishment. Plaintiff continued to conduct it for nearly one year with assiduity and industry, paying off many of the old liabilities; she had fourteen or fifteen apprentices under her, and three or four assistants; she had to pay the expenses of the establishment, and find materials. In March Mr. Young, the defendant, came to St John's from England, and took up his abode at the establishment; he said he had left England in the *Miranda* with Mrs. Young, but that vessel putting back she remained behind, purposing to follow. Upon his arrival he examined the books and required a statement, which was given; he remained in the house about one month, when he discharged the plaintiff and refused to pay wages. During that time he lodged and boarded at the house, and received from plaintiff some small sums of money of the receipts of the establishment; plaintiff also paid for his washing twice; he wrote notes to debtors in his own name for payment, one note so written was produced; he spoke to plaintiff about selling the things off cheap; he refused to allow plaintiff to take two pieces of silk to a lady who owned them. Plaintiff saw in defendant's possession the letter she had written to Mrs. Young about fixing wages; she had also seen letters to Mrs. Young before she went to England in defendant's handwriting. Plaintiff swore to fifty pounds being a reasonable sum for her wages.

Cross-examined—Knew nothing of Mr. Young before he came out last March; all her transactions arose with Mrs. Young, but she always understood Mr Young was coming. Mrs. Young had been forewoman with Mrs. Steer before she set up; received her wages at the rate of twenty pounds until April, 1857, within a few shillings; since then received £22 1s 4d. to credit of present claim; collected in debts and paid away since Mrs Young left; all witness received she got before she left; gave a statement of amounts received since 8th March, and partly before that; kept as regular an account as I could; there were some things I could not remember, and there were many little debts I paid I did not put down, and also expenses of the house; I paid away those sums on account of Mrs. Young's business; I have debited myself with what I received on my own account; I never laid out a shilling but to the best advantage. (The witness continued to describe manner of conducting the business, &c.) Mrs Young was the person who employed me: Mr Young said I should not have any money or anything else for my wages: I do not know about his intentions; I saw a testimonial he showed me from Mr. Brooking; Mr. Young talked of going out to board; I told him we were not situated for a lodger, but I made no objections, because I could not. Defendant looked over all the things in the show-room; I said I thought the creditors ought to have them; I mentioned Mr. Baird because he came to mind first; don't know that the gloves were returned, saw two or three pairs after in the house. I had told Mr. Young I would leave 1st May; never heard defendant say he had nothing to do with it; I incurred very few debts in Mrs. Young's name, only enough to keep the business up; the large debts were contracted before she left; I did not contract Brooking's debt of forty pounds; I paid it off partly; defendant brought an introductory note from Mrs. Young; she had often told me of him, and always expected him. I often asked Mr. Young's advice about the business since his arrival; we worked after his arrival; I took up no goods on credit after.

Re-examined—I am clear that I spent the difference between the £13 8s. and the £27 in the statement about the house and business. Two or three different times defendant said the business had better be closed as soon as possible. I did not receive a penny after my discharge.

Mrs Furlong deposed—That she was in Young's house the Friday before it closed; defendant was there; came by his re-

quest to clean house; he sold some of the things in the house and show-room on Saturday.

Miss Bray deposed—That she left the evening of the day plaintiff left; took out a list of debts to collect by defendant's directions; Mr. Young sold some articles

Cross-examined—I have been fully paid; I trusted Mrs. Young alone; nothing to do with defendant; Miss Bacon was superintendent; defendant sold chest of drawers, couch and other trifling things; Miss Bacon had the charge of the house; she had a cook

Mr. Badcock—Applied for payment of Bowring's account; defendant said he would pay when convenient, but never saw any of his money.

Mr. Baird deposed as to conversation with defendant and a statement of debts and assets he had seen from him; that defendant said he was going to wind up the estate; he replied to a note written to Miss Bacon about Baird Brothers' account; said he was going to sell the goods and pay the debts, that the estate could pay twenty shillings in the pound; said we would have goods in payment; said that some of the things were sold; I have sued him; have not attached anything; had not that luck.

Cross-examined—Defendant said Miss Bacon had been collecting debts; we trusted Mrs. Young to considerable extent; we heard Mr. Young was coming out; never knew anything of him until he came; told me he was Mr. Young; he offered to sell me Mrs. Young's goods.

Mr. Bain—Defendant gave me a written statement at my request; showed me the books; sent down the statement to the shop; I copied it.

Cross-examined—Did not know him before; plaintiff's name was not in statement.

Mr. Ayre—We pay £75 a year to our forewoman; Mrs. Steer, the principal, is here.

Cross-examined—Mrs. Young formerly lived with us for two years; defendant was here then; she had salary; can't say positively whether Mrs. Young's establishment was as extensive as our own or not; Mrs. Young had some small dealings with us.

Mr. Young (the defendant) sworn—Arrived here 8th March; never here before; Mrs. Young came here four years ago; had nothing to do with her coming; nothing to do with the estab-

lishment; did not receive any benefit from it; made no promise to pay plaintiff; did not directly or indirectly authorize Mrs. Young to contract with her; Mrs. Young was at no time my agent here; plaintiff collected some debts after I came; gave me no account since she left; shewing receipts £27 2s 6d., and debit of that £13 8s 9d.—£5 to her own account; she gave me the account since the action, headed "Mrs. Young in account with F. Bacon"; received 13s. from Miss Bacon before she left the house; I asked her if the business was paying; she said no; her father asked me to settle with her. I sold some articles; plaintiff proposed Mr. Baird should have the goods; I objected to it. The lady spoken of got the silk from me; I got a few pairs of gloves; they were damaged; I returned some of them. Plaintiff gave me a statement shortly after my coming, and another since bringing the action; according to my account the balance due the establishment is £113. Plaintiff received debts since Mrs. Young left; had not remitted any to my knowledge; I don't pretend to know about the debts. I left England with my wife last December in the *Miranda*; she put back and Mrs. Young remained behind. I did not come out to take charge of her establishment; had nothing whatever to do with it

Cross-examined—I wrote notes to debtors; I wrote the one produced; I wrote a dozen signed Edmund Young; I have part of the money derived from the goods now; they were a bargain made to the purchasers; I have communicated with Mrs. Young by letter since I came; I before understood from her that she had this establishment; she never wrote for me to come out. I took up my abode at the establishment; lodged and boarded there. Miss Bray collected sixteen shillings, which she gave to me; no person else collected anything. I never remitted anything to Mrs. Young while she was here; she came out in a situation; I did not promise to pay any of the creditors; I said I would get Miss Bacon to collect and pay them; I never directed Mrs. Young to shut up the establishment; I made up my mind to come out with her; I told plaintiff I meant to close the establishment; I sold a couch, chest of drawers—don't recollect the rest; I gave Mr. Bain Miss Bacon's statement; she took the books and called over the items in them; she had nothing to do with the books since she left; some goods I brought out have been attached by plaintiff

Re-examined—Some of those to whom I wrote notes appear in the list. Mrs. Young came to the country against my con-

sent; I was supporting her before I came out. Besides the debts, two beds I brought out are attached.

Mr Pinsent now shewed cause to the rule, and reviewed the evidence as above. He contended that the facts as proven were matters entirely for the jury, who were alone the judges as to whether defendant had recognized and adopted the acts of his wife and fixed the liability upon himself.—*Chitty on Contracts*, 153; *2 Bright's Husband and Wife*, 9; that, taking it as revealed in the foregoing evidence, it was a very strong case, and the jury would not have been justified in returning verdict for defendant.

In legal contemplation the wife had no separate existence and no means of satisfying her contracts, and here it was contended that he might assume her property, take the direction of her business, discharge the plaintiff, &c, &c, and yet repudiate his liability. Mr Pinsent then took up the several acts specifically, which he contended fixed the liability upon defendant. There had been no points reserved, as the whole case had been put to the jury by the learned judge. The recognition and assent of the husband could be proved as well by his acts as by his express words—*Barnes vs Jarrett*, 2 *Jurish* 988; *Petty vs. Anderson*, 3 *Bing.*, 170; *Filener vs Lynn*, 4 *N & M.*, 559; *Hornbuckle vs. Hornbury*, 2 *st.* 177; *Harrison vs Hale*, 1 *M. & R.*, 185; *Luidus vs. Bradwell*, 5 *C. B.*, 580; *West vs. Wheeler*, 2 *C. & K.*, 714.

Mr. Carter, contra, contended that defendant had never made himself personally liable. It would be highly injurious to give the right to sue a party never trusted. Defendant's wife had come to the country against his will. The credit was alone given to her. There was no agreement—plaintiff had entered into the service of defendant's wife at the rate of £20 per annum. Defendant said he never knew anything about the business, if he had assumed the liability and made any express promise, he would have rendered himself liable, but he had not done so. Nothing would have rendered him liable but an express promise; there was no authority here, express or implied, and the husband will be discharged if the credit was given to the wife. During co-habitation there is presumption *prima facie* of the husband's liability; here they were living in different places—any communication between them was unknown to the creditors; the trifling sums he received would not render him liable, nor would the mere sale of a chattel, &c. The learned counsel cited from *2 Bright*, 5, 17, 42; *Manly vs. Scott*;

Smith's leading cases; Metcalfe vs. Shaw, 3 Camp, 32; Moody vs. Malkin's, reports 18.

Chief Justice—The separation referred to in the cases cited by Mr. Carter is, I apprehend, where the confidential relations between the parties had ceased, which is not the case here. The effect of the subsequent acts of the defendant are not matters for the court; he comes out and enters upon the premises and takes possession of the property of which he is the legal owner; he finds a person in charge, who, while he is there, continues to conduct the business; the defendant actually recognized all the acts of the plaintiff in the capacity in which he found her. The liabilities may be fixed upon the defendant by process of facts, in much more satisfactory manner than by mere expressions.

On a subsequent day the following judgment was delivered by Judge Robinson:

The principles of law in this case are of considerable importance in consequence of the generality of their application. It was an action brought by the plaintiff against Edmund Young to recover compensation for work and labor alleged to have been performed by her for the defendant, at his request, and on an account stated between the said parties. At the trial before Mr. Justice DesBarres, in the Central Circuit Court, it appeared that the defendant had never been in the Colony until last April, but that his wife had been residing here for four or five years, during the earlier part of which period she had been employed as forewoman in a dressmaking establishment at an annual salary, and during the last year or two had conducted a similar establishment on her own account and in her own name; that she had hired the plaintiff, in her own name, to act as her forewoman; had taken as many as fifteen apprentices; had contracted debts and purchased goods without the intervention, or knowledge, as it appears, of her husband, the defendant, and in all respects acted, and was treated by her customers and creditors as a *femme sole*. Mrs Young went to England a few months ago, leaving the plaintiff in charge of her establishment in St. John's, and has not returned. Up to this stage the facts and the law concur in exonerating the defendant from any liability in the actions, but in April last her husband arrived in St. John's from England, bringing a letter from his wife, and having with him some letters which the plaintiff had written to Mrs. Young, during her absence, respecting the business. On his arrival he went to his wife's

establishment, and took up his residence therein; he examined the books of the trade, sent out notes in his own name to the several debtors of Mrs. Young, requesting payment; received some of the debts, this only to a small amount, and appropriated it to his own use; gave directions respecting the establishment to the plaintiff, which directions she obeyed; consulted with her upon winding up the business; sold some of the property his wife had left in the establishment, and promised to pay one at least of the creditors who had supplied goods to his wife. On this evidence the defendant moved for a non-suit on the grounds that the services of the plaintiff were engaged by the wife of the defendant, they then living apart, and that the credit for wages was wholly and solely given to the wife, and that there was not any evidence of the husband having assented to the hiring or employment of the plaintiff by his wife. The cause of the separation of husband and wife did not appear, and no question did, or could well arise as to the plaintiff's claim coming within the category of "necessaries." The judge reserved the points, but refused to non-suit, and left it to the jury to say whether the acts of the defendant amounted to a recognition and ratification by him of the contract previously made by his wife. The jury found that they did, and gave a verdict for the plaintiff; Mr. Carter took out a rule to set aside this verdict upon the grounds before stated, to which Mr. Pinson shewed cause. The principles contended for by Mr. Carter "that the law disables the wife from making any personal contract, or incurring any debt to bind her husband without his express or implied authority," are undeniable, and the practical difficulty in such cases usually arises where an *implied* authority is attempted to be set up. In many cases the law implies such authority, and throws the onus of disproving such obligation upon the husband, as where the husband and wife are living together, or where the debt is for alleged necessities, or contracted in the usual course of dealing; but where the husband and wife are living apart, as in this case, the presumption of law is against the existence of such authority and the onus of proving it rests on the party who seeks to charge the husband. We cannot agree with the proposition advanced by Mr. Carter, that the husband can only be made liable by an express assent to the acts of his wife. We think all the authorities shew that such assent may be implied, and for the purpose of establishing an implied assent the acts of Mr. Young were submitted to the jury. In the case of *Emmet v. Norton*, the Lord

Chief Baron lays down the law fully upon the subject of contracts made by the wife for which the husband would be liable. (Here his lordship read the case). We are of opinion that the judge at the trial acted properly in leaving the evidence in the cause to the jury, the question of whether the debt to the plaintiff was or was not contracted, or subsequently recognised and ratified by the husband being one peculiarly for them. The maxim of law *omnis ratihabitio retrahitur, et equiparatur mandato* governs this case, the jury having found that there was such a ratification by the husband. It is equivalent in law to the previous command, and establishes the husband's liability. The rule therefore must be discharged.

Mr. Pinsent and *Mr. A. Emerson* for plaintiff.

Mr. Carter for defendant.

BEARNS v. PERCHARD.

1858, January. HON. MR. JUSTICE LITTLE.

Practice—Setting aside writs of fi fa and ca sa for irregularity.

On an application to set aside a writ of *capias ad satisfaciendum*, under which the defendant was in custody, the Court, notwithstanding that the evidence abundantly proved irregularities, made the release conditional by restraining the defendant from bringing any action for the imprisonment.

THE following rule was heard yesterday by Mr. Justice Little and the judgment thereon, given below, delivered to-day. The rule was, upon reading the defendant's affidavit and the several writs of *fieri facias* and *capias ad satisfaciendum* mentioned therein, and hearing Mr. Pinsent for the defendant, I do order that the writ of *capias ad satisfaciendum* upon which the defendant is now in the custody of the sheriff, and all former writs of *capias* be set aside for irregularity for the following causes, viz. that the first *capias* was sued out before the return of the *fieri facias*; that the writs of *capias* do not recite former writs, and have no mention of the amount paid on the judgment in the body of the writ; that the several writs of *capias* contain charges for costs not claimable from defendant; that there are no continuances of the writs; that the *teste* of the writs should have been on the day of return of the former writs; that no *scire facias* has issued; that the writs do not

follow the prescribed form; that the *capiases* have been issued for an amount not due; that sixty-two pounds have been paid on the judgment, and defendant has been ready and offered to pay the balance; that the imprisonment of the defendant is fraudulent and oppressive, and upon the other grounds appearing from and in the said affidavit and writs with costs, unless cause to the contrary be shown before me to-morrow, Thursday, at 11 o'clock, a. m.

Judgment:—In this case there is no doubt that the first *capias ad satisfaciendum* was irregularly issued before the return of the *fi. fa.* part of the amount for which this first *ca. sa.* has issued had been levied and paid under the *fi. fa.* by means of the warrants placed by the sheriff in the hands of the third parties indebted to the defendant, as stated in the sheriff's return, which I regard as equivalent to a levy on his goods for a part. This position is clear from the authorities cited by Mr. Pinsent, for the defendant, "that if any amount, however trifling, has been levied the plaintiff cannot sue out any other writ of execution until after the return of the first writ, and this though the sheriff may have withdrawn the execution."—*Coperdale v. Debonnaire*; *Barnes*, 213; 6 *Taunton*, 370. But this objection does not hold good against the last *capias*, as it is sufficient, if the return is made in time, to shew cause against an application to set aside the subsequent writ—1 *Archibold*, 597. Yet the last *capias* is irregular on other grounds in not reciting the first writ and stating the amount levied under it.—*Chapman vs. Broilly*, 8 *M. & W* 49. The proper form of execution in such a case as the present is given in Chitty's forms, and it appears to me it is necessary to follow the practice strictly in this respect to prevent the process of the court from being abused. This defect in the proceedings becomes more serious when viewed in connection with the allegation that the amount of the judgment has been paid by the defendant, except a small balance of about six pounds, which defendant states he offered to pay before he was arrested. Without undertaking to decide positively that the sum of thirty-nine pounds, paid by Mr. John Stuart to the plaintiff on the part of defendant, was actually and expressly paid and received on account of the *ca. sa.*, it certainly appears to me that the execution was used as the means of enforcing that payment; and I am of opinion that the defendant intended it to be placed to the credit of the balance due thereon, and that Mr. Stuart paid it in part liquidation thereof; now in this view the amount for

which the *fi. fa.* issued, including costs, being £58 10s 4d., and deducting from that sum the £17 8s. 5d. levied thereunder, and £34 4s. 8d., sterling, paid by Mr. Stuart, making together £52 3s. 8d., there is only £6 7s. 3d., sterling, due on the judgment and execution, nothing being allowed to the plaintiff for the costs on the irregular and defective writs. On the other hand, the plaintiff swears that the defendant owes him several other sums of £60 and £100 (which is denied by the defendant), and that that the £34 4s. 8d. was not "expressly" paid on account of the present *capias*, which is indorsed for £41 2s. 9d. sterling, as the amount to be levied, and for which the defendant has been arrested. I feel, without questioning the accuracy of the plaintiff's statement, that I am bound to consider the sums of £17 18s. 5d. and £34 4s. 8d., sterling, as paid by means of the issuing of the *capias*, and on account of the executions issued in this cause, and therefore that the levy has been excessive; in other words, that the defendant has been imprisoned for more than he properly owed on the judgment. It has been urged that these errors may be amended even now on the authority of *Larouche v. Washborough*, 2 T. R., 757, and other cases cited by plaintiff's counsel. If, however, the defendant has suffered by the mistake, no amendment is permitted; assuming the truth of defendant's statement that he offered to pay the balance before he was arrested, I must conclude that he has been damnified by these mistakes, and I therefore set aside the *capias* under which the defendant is imprisoned and order his discharge, restraining him, however, from bringing any action for the imprisonment. Let the writs be set aside with costs and the defendant discharged out of custody.

Mr. Whiteway for plaintiff.

Mr. Pinsent for defendant.

1859, *January*. BRADY, C. J.; ROBINSON, J.

Defamation—Libel—Evidence—Admission of Articles published subsequent to libel to establish malice.

In an action for libel the court permitted articles, published subsequent to the libel to be read to the jury as evidence of the malicious character of the defamatory words.

MR. HOYLES opened the case to the jury: the action was one of libel, (in which the damage was laid at £2,000) which libel appeared in the *Newfoundlander*, of which paper the defendant was editor, on the 9th December, 1858, at this time the plaintiff was Financial Secretary of the colony—the defendant, as the jury had been informed, was editor of a newspaper called the *Newfoundlander*. The jury were well aware that differences and disputes had then and still existed between the Governments of France and England, respecting the interpretation of the Fishery Treaties referring to this colony, and certain articles appeared in the *London Globe* referring to this subject, purporting to come from its Paris correspondent, which were untrue and libellous upon certain parties in this colony, these articles the defendant in his paper notices, characterises them as gross libels, and fixes their authorship upon the plaintiff (The learned counsel here read the *Globe* correspondence and the article in the *Newfoundlander*, which is as follows:—

“The French screw frigate *Sesostris* has brought to Brest Harbor three days’ later dates than last mail, and brings account of terrific rioting by the fishermen of St. John’s in consequence of supposed French encroachments on the river fishing as well as coast banks in that colony. The present officials are accused of playing into the hands of the foreigner by putting a new and false interpretation on existing treaties. Mr Judge Little is one of those public offenders, and he had just brought from Halifax a brother of his own to get elected into the Legislature as a member for St. John’s. The people pelted the new candidate in spite of the Irish bishop, Dr. Mullock, a Franciscan friar, who of course sided with France. But he seriously damaged his popularity among his flock thereby, and a collision between the bark of Peter and the cod smacks was impending.
—*Globe correspondent.*

Now the question is, who has been the slanderer? Certainly not the correspondent of the *Globe*, the Rev. Francis Mahoney, of Cork, better known as Father Prout, who knows nothing of Newfoundland. Who then has corresponded with Father Prout

or with his intimates or acquaintances? Who here was likely to have given just such statements as the above, with their *mistakes* no doubt deemed very cunning covers or off-scents? Common suspicion has fixed on one who, forgetting the French warning *qui s'excuse s'accuse*, has publicly and privately endeavoured to escape from it. All we know is, that his public denial is the subject of ridicule as common as the suspicion; and that his private version too is regarded with entire discredit—*Nfldr.*, 9th Dec., 1858.

The above foul libel upon the plaintiff, the defendant does not dare to justify, but pleads the general issue; whilst giving full scope to the liberty of the press, juries should pause before they sanctioned its licentiousness. The article referred to had nothing to do with plaintiff in his public or official character as Financial Secretary, but was of a private and personal nature. The charge brought against the plaintiff was a most serious one. The *Newfoundlander* accuses him of being the 'slanderer.' Of what? First, the officials of the colony are charged with a traitorship to the people in secretly giving away their fisheries to foreigners—then one of the judges of the Supreme Court (the Hon. Judge Little) is criminated as an accessory, and the Roman Catholic Bishop, the Right Rev. Dr. Mullock, is also accused as a participator in the plot. Mr. Tobin is a Roman Catholic, and it is only natural to suppose that were he the author of the *Globe* article, reflecting as it did so severely upon his Diocesan, that the social intercourse and friendship which up to that time existed between them would be severed. Such was the case. The jury should be informed that two days before the publication of this article in the *Newfoundlander*, some remarks were made by the editor of the *Express* in his paper imputing the authorship of the *Globe* correspondence to the plaintiff; upon the following day the plaintiff wrote this letter in the *Times* newspaper, denying the accusation:

ST. JOHN'S, DEC. 8, 1858.

(To the Editor of the *Express*.)

SIR,—My attention having been directed to an article in the editorial column of your paper yesterday (7th inst.) as intended to point to me, I have simply to remark that I never had any connection whatever, directly or indirectly, with the article quoted from the *Globe*, and the first intimation I received of its existence was from hearing it named yesterday evening by a gentlemen recently called to the Legislative Council.

Your accomplice in the paragraph I am noticing attributes to me an indulgence in "practical joking." Permit me to tell him that, as I know he is as cognizant of most matters that occur in this community as I am, that he will readily agree with me that Judge Little's brother's appeal to the electors of the Western District of St. John's, Despatch No. 66, and the opening of letters at the Post Office in the way complained of in the last session of the Legislature, are matters too serious for "practical joking."

Having always had the highest respect for His Lordship, the Right Rev. Dr Mullock, whose friendship I have not only enjoyed but have reason to be grateful for, he will no doubt fully appreciate the good intentions of the mischievous interference your *secret* and *meddlesome* accomplice has impertinently volunteered.

Holding your cowardly, secret associate scribe in thorough contempt, I challenge the fertility of his slanderous, lying, suggestive imagination, as well as all those who assist him in his vile pursuits, to produce *any act, word or deed of mine* wanting in respect or reverence to the Right Rev. Prelate, *directly or indirectly*, since His Lordship assumed the charge of this diocese; for the mention of whose name I trust he will pardon me, having been most reluctantly drawn into the present correspondence.

I am, sir, your obedient servant,

JAMES TOBIN.

Now the remarks of the *Newfoundlander* the day after refer to this letter, it accuses him of being the slanderer upon his Bishop, the officials, and the people, and publicly denies the truth of his disclaimer. The "private version" refers to a letter sent by the plaintiff to his Bishop, solemnly disclaiming any connection with such correspondence. What then were the consequences of this series of foul imputations to plaintiff? in a social point of view they were grievous; he lost the society of his Bishop and others with whom he had formerly been on terms of social terms and intimacy. Then it will be borne in mind he was Financial Secretary, with a salary of £300 stg. a year, from which he was dismissed by the government in consequence of the bitter hostility created against the plaintiff by this and other articles of the defendant. The malevolence of the defendant is exhibited in subsequent articles in the *Newfoundlander*. (Attorney General objects to any evidence sub-

sequent to alleged libel going to jury. After argument objection saved.) He is styled "the man of the *Globe*," and "Joe Tanner," and such like epithets, which shew that his malicious feeling against the plaintiff was not of a temporary but of a permanent nature (Learned counsel here quotes *Newfoundlander* of February 21st, 1859, May 23, 1859, October 27, 1859, October 31, 1859.) Thus a series of persecutions have been got up against the plaintiff, which leaves him no redress but an appeal to a jury of his country.

Mr. Hoyles having closed his address,

Judge Little said, that as his name had been referred to in the *Globe* correspondence, he would take no part in the trial of the cause.

The proprietorship of the *Newfoundlander* was then proved, and the different articles before referred to read.

Right Rev. Dr. Mullock was then called: Was aware that articles appeared in the London *Globe* referring to the fisheries of Newfoundland; read articles in *Newfoundlander* of 9th Dec.; believed that "common suspicion" as stated in that article, pointed to plaintiff; believed that the "private version" alluded to referred to a letter sent to witness by plaintiff, (which was read.)

To the best of belief received first intimation of the publication of these articles or correspondence in the *Globe* from Mr. Grieve.

Cross-examined—Have known plaintiff since I came to the country, was intimate with him up to two or three years ago when our intimacy ceased.

(Question: What was the cause of your lordship then ceasing to be upon terms of intimacy with him? Question objected to by Mr. Hoyles, and after argument disallowed.)

Our intimacy ceased before I read article in *Globe*; the general opinion was that plaintiff was the suggester of the *Globe* articles, and Father Mahoney, generally called Father Prout, the writer; received letter from plaintiff stating he had no connection with the articles in question. (Question: Did you believe the denial in that letter? Objected to, after argument allowed, point reserved.) Did not believe it; was in Paris last summer twelve months, plaintiff has friends in Paris. (Question: What description of character does plaintiff bear? Objected to, rejected and point saved.) Am acquainted with Father Mahoney in Paris.

Re-examined—Think Mr. A. Shea was one who spoke of the rumour against plaintiff as being either the author or suggester of the *Globe* correspondence, heard it from many persons besides; have something more than suspicion myself; am almost certain of it. (Question: Did Mrs. Tobin ask Father O'Donel to investigate the matter in Paris? Objected to and after argument disallowed.

Hon. James Tobin, the plaintiff, proved the affidavit of the proprietorship of the *Newfoundlander* to be the handwriting of the defendant. Held office of Financial Secretary from August 7, 1855, to 21st December, 1858, with an annual salary of £300 stg., was aware that before 9th December, 1858, differences existed between France and England respecting fishery claims; read article in *Newfoundlander* of 9th December. (Here plaintiff proved inuendos, &c.) Wrote letter in *Times* over his own name and private letter to Dr. Mullock disclaiming the authorship of or any connection with the articles in the *Globe*. Placards were issued from the *Newfoundlander* office, calling a public meeting which took place on Tuesday the 14th Dec. Defendant was at the meeting; there was a preliminary meeting at Mr. Jordan's, in Water street, on the 11th; saw the public meeting; saw defendant and Dr. Mullock going towards the meeting, but the Bishop parted with defendant, and turned up the lane near Mr. Nugent's house; there were three or four hundred people at the meeting; previous to publication of article in *Newfoundlander* of 9th December, was friendly with his Bishop, up to Nov., 1857, on most intimate terms, from that to 9th Dec., 1858, not so intimate, but from 9th December the Bishop ceased to speak to him or his family. The Bishop dined with him in Nov., 1857; the Chief Justice was also there. The Bishop never said a harsh word against him before his fall before that day. A supersedeas issued on 25th March dismissing him from office of Financial Secretary; believed he was dismissed on account of the hostility got up against him by E. D. Shea, the defendant, by his editorial of the 9th.

Cross-examined—Received a letter from His Excellency Sir Alexander Bannerman, in reference to his suspension.

Dr. Mullock dined with him two years ago; at the time referred to the Chief Justice Dr. Shea, Messrs. Fox, Mare and some French officers were present; never went to Dr. Mullock to solicit him (nor did any of his family) to dine with him on that occasion.

Plaintiff re-called : Never was directly or indirectly connected, or had anything to do with the articles in the *Globe*; the first time ever knew *Globe* referred to Newfoundland affairs was, when he saw it in the Newfoundland *Express*.

Has been in Paris twice; knows Father Mahoney (alias Father Prout) in Paris. His wife corresponds with her sister, who lives in Paris, and is married to Mr. Hewitt. Father Mahoney and Mrs. Hewitt know each other.

The plaintiff's case having closed, the Attorney General moved for a non-suit upon a point, which, after argument, was reserved.

The Attorney General then addressed the jury for over two hours, contending that the defendant being a public journalist, would be unworthy of his position did he not notice a "public rumour" which universally pointed at the plaintiff as being the author of vile slanders in the *Globe*. The plaintiff lost his situation not by the article in question, but in consequence of a gross libel upon the administration of justice, published by him in the public newspapers, which stated that because the revered head of the Catholic Church was in some way connected with the matter in question, no justice could be expected from a court or jury. The learned counsel continued at great length, and called

Hon. John Kent—Is Colonial Secretary; initiated the action of the Government in the dismissal of plaintiff from office in consequence of his libel upon the courts of justice. The article in the *Newfoundlander* had nothing to do with his dismissal; it was caused by the insinuation in the public prints that so great was the Bishop's influence, no suitor could receive justice where he was in any way concerned. The Government were responsible to the country for procuring for the people honest and upright courts of justice, and a reflection of this sort upon the courts of justice was an attack upon the Government, whose servant he was. It was the *bona fide* intention of the Government to have retained him in office if he had retracted the libel he wrote on the administration of justice.

Cross-examined—Was present at the public meeting; there were about 2000 persons there; had a preliminary meeting before at Mr. Jordan's; somebody stole all our hats that night; had to borrow a wide-awake to go home; Messrs. Shea were there, also the Attorney General, and a great many others; defendant was at the public meeting; can't say for certain if he spoke there.

The defendant's case having closed, Mr. Hoyles addressed the jury, condemning vituperation of the Attorney General and denouncing the conduct of the defendant in persecuting an innocent man.

His Lordship Mr. Justice Robinson charged the jury nearly as follows:—

Gentlemen of the Jury,—This, as you have heard, is an action for libel, in which the damages are laid at £2000. You are aware of the high position both parties at the time of the alleged libel held in this colony, and it is only natural that this cause, being to them one of considerable importance, should create excited feelings on both sides; whilst such excitement is natural to them as regards this action, it must not operate with us. We, gentlemen—that is, the Court and you,—must be above all influences and do justice calmly and fairly. To one observation of the plaintiff's counsel I feel bound to advert, because it has reference to administration of justice. I must dissent from the condemnation by the learned Attorney General of the plaintiff for having brought the Right Rev. Dr. Mullock (his Bishop) into court as a witness; all individuals, from the highest to the lowest, are amenable to the process of this court, and bound to give their testimony to the courts of justice, and I am sure the Right Rev. Prelate always has been and always will be ready to assist in any way in contributing to the fair and impartial administration of justice—there should not therefore be the slightest imputation cast upon the plaintiff for summoning the Right Rev. gentlemen as a witness in his cause. The plaintiff claims damages against the defendant for ascribing to him in the *Newfoundlander* newspaper of the 9th December, 1858, the authorship of certain articles in the *London Globe* reflecting very severely upon parties high in office in this country, and discrediting plaintiff's denial of such authorship. Both parties admit that the article in the *Globe* is a gross slander, and to impute untruly to any person the authorship of such slanders is a serious matter: and certainly the plaintiff has today given on his oath an unequivocal denial of such authorship. The defendant pleads the general issue, and says in his defence in effect, “as a public journalist I only did my duty; I would be unworthy of my position did I not notice a rumor of universal notoriety, one too which fixed upon a public officer the authorships of libels concerning the best interests of the country” The defendant, however, goes on further and casts discredit upon the plaintiff's disclaimer, which he had published

in the *Times* newspaper. Gentlemen, the law respecting a libel is, "that whether a writing is or is not a libel is a question for the jury, and the judge is not bound to give any opinion upon the particular writing, but to define what a libel is in law; and to tell you in the language of an eminent judge, that "a libel is a publication without justification or lawful excuse, calculated to injure the reputation of another by exposing him to hatred, contempt, or ridicule." A writing may be a libel on a private person which would not be so on a person in a public character or office, for the acts of public men which concern the public may be lawfully commented upon, provided it be done without malice; but in either case to impute corrupt or bad motives is a libel. Applying this definition to the present case, you will ask yourselves honestly and fairly if, from the evidence, the publication alluded to is a libel; and if it is, it is only fair, it is but simple justice, that the plaintiff should be indemnified for the loss he sustained thereby. You must not, gentlemen, be oblivious of the right a public journalist has to comment upon and criticise closely and strongly the letter of any person who either in a public or private matter makes himself public property by appearing in the public prints, but the criticism must be fair and legitimate and without malice.

There are two questions, gentlemen, for your consideration. 1st, Does the article in question which appeared in the *New-foundlander*, of which defendant is proprietor, on the 9th December, 1858, refer to the plaintiff? upon which I apprehend you will have little doubt; 2nd, Is it a libel?

It is fair to both parties that I should observe that the publication itself divides itself into two parts; it first refers to the rumors respecting the plaintiff, and the existence of such rumors is proved beyond a doubt, and was the occasion of plaintiff's own letter to Bishop Mullock and to the *Times* newspaper, and so far the fact is much in favor of the defendant. But in the concluding part of the article the plaintiff's word and disclaimer is treated with discredit, and by fair inference the authorship of the slanders in the *Globe* is sought to be fixed upon him. If in the whole case you shall find the article to be a libel, the plaintiff will be entitled to *general* damages, for there is no justification pleaded. As regards the *special* damage arising from loss of office, which the plaintiff alleges he has sustained, you must be satisfied that the loss of his office was the natural and legal consequence of this libel, if you shall so find it, and not too remote; upon which I will read to you the

evidence of the plaintiff for and of Mr. Kent against that conclusion, to which is to be added the Governor's letter to Mr. Tobin offering him the alternative therein mentioned. In no case must the several newspapers put in evidence merely to prove malice, influence your judgment in the slightest degree in estimating damages.

Gentlemen, I again repeat to you that you must be in the consideration of such a matter as the present, calm and impartial. We cannot enter into the feeling of either of the litigants, for we are bound by solemn oaths to do justice, and you should consider this case as if A were plaintiff and B defendant. Remember, whilst on the one hand if a public journalist has a public and important duty to perform and is allowed fair latitude for comment and criticism, upon the other, persons, whether they be public or private, are entitled to protection against libellous aspersions from whatever source they may emanate.

The jury retired about 9 o'clock and at half-past 12 they not having agreed, were locked up and court adjourned. Next morning at 11 o'clock the jury not agreeing, were discharged.

Mr. Hoyles, Q. C., and Mr. F. B. T. Carter for plaintiff.

Hon. Attorney General and Messrs Wood, Little and O'Donnell for defendant,

1859, *January*. HON. MR. JUSTICE ROBINSON.

Practice—Rule nisi—New trial—Misdirection—Vendor and Purchaser—Insolvency—Vesting of property in purchaser—What is required.

On the 27th of October, A. D. 1857, David Steele, of St John's, Newfoundland, entered into a verbal contract with P. Rogerson & Son for the purchase of 400 bags of bread, payable by a note at three months, which note was discounted. The bread remained in the store of Rogerson & Son who on several occasions, desired Steele to remove it. On November 23rd Steele took delivery of thirty bags of the bread. On November 25th Steele sold 350 bags of the bread to one Boden who paid Steele for the same in a three month's note which note Boden paid. Boden took no steps to become possessed of the bread until December 16th, upon which day Steele suspended payment. Steele's note not having been paid Rogerson, the latter refused delivery of the bread to Boden on Steele's order. In an action brought by Boden against Rogerson for the recovery of the value of 350 bags of bread.

Held—That Boden had no action. In order to vest the property originally in Steele, it should have been separated, set apart and appropriated for Steele's benefit. Nothing of the sort had been done. The property never vested in Steele so as to enable him to sell to Boden.

A sale is not completed and the property is not vested in the vendee until there has been a delivery, and acceptance, and such delivery is not completed, so long as anything remains for the vendor to do, whereof the quantity, quality, price or identity of the chattel sold is to be ascertained.

THIS was an action of trover brought to recover the value of 350 bags No. 2 Hamburg bread, under the following circumstances: On the 25th October the defendant sold to David Steele 400 bags No. 2 Hamburg bread at 27s. 6d a bag, for which said Steele gave defendants a note of hand, which defendants accepted and discounted for the purpose of their trade; no delivery was made at the time, nor was it stated where the bread then was—defendant occupying stores on both the north and south side of the harbor. On November the 22nd defendant sold plaintiff 350 bags No. 2 Hamburg bread through Mr. Anthony, broker (since deceased), who told plaintiff at the time the bread then lay in Rogerson's store, south side. The ordinary bought and sold notes passed between Steele and plaintiff, and was discounted by Steele. At the time of the first transaction between defendant and Steele, reference was made to a certain quality of bread sold by defendant to Mr. Alsop, and the bread in question was to be of similar quality. On the 16th December Steele sends an order for 30 bags, which Rogerson's storekeeper delivered; shortly after Steele meets defendant, J. J. Rogerson, in the street, and Steele says the bread

was not of the same quality as that sold to Alsop, and he would not pay 27s. 6d. for it; Rogerson replied that he (Steele) would not get it less. On the 26th December Steele suspends business, and two days after Boden obtains an order from Steele for the 350 bags, and sends for the bread to Rogerson, who refuses delivery on the ground that Steele had not paid for it. Rogerson and Boden had: both had to take up their discount notes. The action was now brought against Rogerson to recover the sum of £431 17s. 6d., being for the value of bread and interest; the plaintiff maintaining that the first sale to Steele was a valid and complete sale, and vested in him a legal and sufficient title to dispose of it afterwards to Boden.

The plaintiff then called his witnesses.

Thomas Seymour deposed to being in Mr. Boden's employ in the fall of last year; he went over to south side on the 16th December, by plaintiff's direction, to obtain delivery of the bread in question: saw storekeeper Jenkins, who refused to deliver without an order from Mr. Rogerson; witness had an order from Steele; the storekeeper pointed out the bread, saying there is the bulk you want, Mr. Steele had 30 bags of it the other day: the bulk contained about 300 bags; he also said that Mr. Rogerson had countermanded the delivery of bread to Boden; then went to Mr. Rogerson with Steele's order for the bread, who asked if witness thought him a fool, and walked away.

David Steele—Bought the bread from Rogerson about a month prior to sale to Boden; Rogerson at the time bought from me 1700 qtls. fish, for which he gave me his note for £1775, which I took and got discounted, and I bought four hundred bags of bread from him at 27s 6d., bread to be the same as certain quality sold by Anthony to Alsop; gave note of hand to Rogerson for the bread (£550); it was a four months' note: there was no note or memorandum in writing respecting the sale: did not pay the amount of the note when it fell due: met the defendant in street and made remark that bread was not of quality agreed for, and would not pay him 27s. 6d for it; he was in a hurry going to the council, and only hasty remarks passed; on the 16th December gave order for 30 bags on Rogerson and got them; there was no other delivery of the bread to me; never saw the bulk; do not know on what side of the harbor the bread was stored; Rogerson has stores on both sides; was not in store to see bread; was insolvent two days before I gave Boden the

order for 350 bags; was in fact insolvent when I sold the bread to Boden, and when I bought the bread from Rogerson.

The Attorney General contended for a nonsuit on the following grounds: 1st, There was no sale note of bread between Steele and Rogerson, no note or memorandum in writing, nothing but a verbal agreement and a note of hand for the consideration; no actual or even constructive delivery; it was not even known to the vendee on which side of the harbor the bread was stored; the bread was to be of a certain quality; it was open to the vendee to object to, which he did, and which concluded the transaction. Afterwards on the 25th November, Steele sells 350 bags to Boden at 25s 3d. a bag; defendant receives no notice of sale to Boden until 26th December, and two days before this Steele had suspended, and was insolvent. There was no appropriation or acceptance of bread by Steele—the bread was not counted or laid aside, not identified or sold as a bulk. There being no selection or acceptance, the property was not legally vested in Steele to enable him to make an after sale or disposal to Boden—there being besides no signed note or memorandum in writing, the case was clearly within the 17th section of the statute of frauds.

2nd—It was open to Steele by the agreement to object to the quality of the article sold, which he did, by saying the quality was not the quality agreed on, and he would not pay 27s. 6d. for it, which was a virtual conclusion to the transaction.

3rd—That Steele, having become insolvent before his note became due and bread delivered, the defendants had a lien on the bread which they could not be legally dispossessed of until the price for the bread had been paid.

4th—As this is an action of trover in which there must be a right of possession as well as that of property, Steele could not have maintained an action of trover, therefore plaintiff cannot.

5th—That plaintiff, as sub-vender, had not selected 350 bags out of the 370 which remained in Rogerson's store, nor were 350 appropriated either by Steele or Rogerson, nor identified, counted, or separated from bulk, and the property did not vest in Boden as sub-vendee, and whether Steele could or could not maintain trover, Boden could not, and his only remedy would be a special action against Steele. Cites *Statute of Frauds* (17 sec.); 1 *Addison on contracts*, 282. If no manual transfer, and goods not removed from store, there must be a separation, identity, &c.—8 *Barn & Cress*, 621, 283; 4 *Barn. & Addl.*, 568; 3 *Manning & Scott*. There must be both delivery and

acceptance, such as to divest property from vendor.—*2 Barn. and Addl.*, 321; *Palmer vs. Henderson*. Right of lien in case of insolvency—*Maul & Selwyn*, 413 (*Duck & Davis*) *Ros* 583; *Barn. & Cress*, 948; *5 term Rep.* 215; *Morton on Vendors*, 318; *1 Adl. on contracts*, 298.

Mr Hoyles, Q. C. contra. —In this case there was a part delivery; here there was also payment of purchase money by Steele's note, which was discounted by Rogerson and the money appropriated to the business of his trade. As to there being no appropriation, we have evidence to the contrary, for the store-keeper pointed out to Seymour a bulk of bread, saying there is your bread.—*13 East*. 614, *Whitehouse, et al vs assignees of Frost*. As to the objection to quality by Steele, the Attorney General could not be serious in urging a passing hasty remark as an abandonment of contract deliberately entered into. If Rogerson at the time considered the negotiation at an end, why did he not return Steele's note and place both in the same position they were in before the transaction? If it was open to Steele to object, and if he did make the passing objection referred to, his subsequent order for delivery to Boden was a renewal of the whole bargain which the court would recognize. As to Steele becoming insolvent before note fell due, Attorney General forgets there was part delivery of the goods; a promissory note also passed which completely takes this case out of the statute of frauds. The law is clear where promissory note is given, as in this case, the vendor's right ceases.—*3 Scots Reps*, *Chitty on contracts*, 334. Where goods are sold on credit on bill of exchange, vendor loses his lien. It would be different if the note were in the hands of the vendor himself, but here it is in the possession of third parties, and the vendor's lien does not revive. Rogerson puts this note in circulation, and he has the benefit of it, and the goods too, and it is absurd to say he still retains his lien.—*2 B. new cases*, 755. There was the right of property in Steele, there was payment by him; there was part delivery of the purchase goods; he could maintain trover; everything having been done on the part of the vendor and the vendee in the first transaction that the law required. Here is afterwards a specific sale of 350 bags of bread, and it may be shown they belonged to a larger quantity, but we have the bulk pointed out by the store-keeper—a delivery had been previously made—nothing then required to be done.

The Court reserved the consideration of the points, and asks the Attorney General to go to the jury.

The Attorney General then addressed the jury, contending the non-liability of his client, for the reasons before mentioned.

James J. Rogerson was then sworn, who stated the circumstances of the sale to Steele, as before-mentioned—no sale note passed, no memorandum in writing. The bread was to be of the same quality as that sold to Alsop—met Steele afterwards opposite the Union Bank who objected to the bread, and said he would not give 27s. 6d. for it; witness said then you cannot have it for less. At the time of sale nothing was said about time of delivery; it was not mentioned where the bread was—has stores both sides of the harbor—had to pay Steele's note when it became due; 16th December received Steele's order for 30 bags bread, delivered them—after this he objected to the quality, &c.; knew Steele had failed on morning of 26th December; Steele never paid for bread except by note of hand, which I discounted, and had to pay afterwards; Steele was not debited in books for flour,—thought bargain was at an end when he excepted to the quality of the bread.

David Reed—book-keeper of David Steele—knew of the order given for the 30 bags; heard Mr. Steele object to the quality, and received his directions to take no more of it without further orders. The order for the 350 bags was given on the 26th December by Steele on Rogerson for the delivery to Boden of 350 bags; the order to Boden was given two days after Steele suspended.

William Jenkins, store-keeper of defendants, remembers demand of delivery of bread for Boden by Seymour; had previously given 30 bags for Steele. I said in reply to Seymour's demand that I knew nothing of any bread of theirs. I had been ordered by Mr. Rogerson not to deliver bread without an order. I pointed out the bulk of No. 2 bread from which Steele's 30 bags had been taken. I never said it was Steele's bread, only the bulk from which the 30 bags had been taken; he took a couple of the biscuits and told me Steele had failed, and Boden had paid Steele for 350 bags of bread; this was the first intimation I had of Steele's insolvency; there were 300 bags only of No. 2 bread then in the store; this bulk was separated from others by a small space.

Mr. Hoyles then closed to the jury, contending at some length for his client's right to recover at all events for the 300 bags of bread which lay in the store,—these had been legally appropriated and pointed out by the store-keeper; he also claimed interest upon the purchase money.

His Lordship the Chief Justice charged the jury. After complimenting them upon the time and attention they had devoted to the hearing of the case which had now occupied the Court two days, and observing that both plaintiff and defendant had come before the Court with real merits in point of justice, yet the Court must direct the jury that in point of law they must return a verdict for the defendant. It was hard certainly on the plaintiff to lose this large sum, as it would be on the defendants, but the only question between them was, who of the two was to be the victim to Mr. Steele's unfortunate failure? The law was against the plaintiff; in order to vest the property originally in Steele, it should have been separated, set apart, and appropriated for Steele's benefit; nothing of the sort had been done; even the learned counsel for the plaintiff who had conducted the case with his usual ability, was obliged to recede from his original demand and close to the jury for 300 barrels instead of his first demand, 350 barrels. The property in the eye of the law had never legally vested in Steele so as to enable him to sell it to Boden. The jury must therefore take the law from the Court and return a verdict for the defendant.

The jury without leaving the box returned a verdict for defendant.

The jury having retired, Mr. Hoyles excepted to the charge of the Chief Justice, and moved for a *rule nisi* for new trial on ground of misdirection.—*Rule nisi* granted.

On a subsequent day the following judgment was delivered:

The argument of the *rule nisi* for a new trial was heard this day. Mr. Little shewed cause to the rule and contended that the verdict for the defendant must be confirmed; that the facts proved at the trial (as reported) negatived any identification or specific separation or selection from the bulk of the bread bought by Steele from Rogerson and resold by Steele to Boden; that there was no acceptance to satisfy the Statute of Frauds; that there had been no selection by Steele of the quality he would take, and that the part delivery of the thirty bags was not a constructive delivery of the whole; that Steele having become insolvent Rogerson had a lien on the bread for the price. The learned counsel cited—*Roscoe*, 317; *Morton*, 315; *White vs. Wills*; 1 *Taunton*, 176; 4 *Taunton*, 646; 1 *Addison*, 281-2-290; *Morton*, 59-61; 1 *Addison*, 283; 3 *B. & Al.*, 323; *Morton*, 318; *Roscoe*, 583; 2 *Crom. and Mee*, 504; 1 *Addison*, 292-298.

Mr. Hoyles, contra, contended that there had been a sufficient appropriation in the fact that in the bulk from which the thirty bags had been delivered there was a less number than three hundred and fifty bags, the number sold, and that it had been referred to by Rogerson's storekeeper as Steele's bulk; also, that defendant's lien for the price had ceased, as he had taken Steele's note which was still current and had not been dishonored and cited from *2 Bingham's N. C.*, 755; *11 East*, 210; *9 Ad. and Ellis*; *6 B. & C.*

Judge Robinson, at a subsequent day, delivered the judgment of the Court in this case and in *Ridley vs. Grieve*, a case of a similar nature arising out of the insolvent estate of Steele.

This case now comes before the Court on a rule *nisi* to set aside the verdict and grant a new trial upon the ground of misdirection. The learned Chief Justice having charged the jury to find for the defendant, as, in his opinion, the bread, the subject of the action, did not vest in Steele, through whom the plaintiff claims, and that he, therefore, could not transfer the property in it to the plaintiff.

It was an action of trover brought to recover the value of three hundred and fifty bags No. 2 Hamburg bread, and to enable him to recover the plaintiff must have had the right of property and right of possession in the goods; the great question in the case was whether the facts in evidence did or did not constitute a full and complete delivery of the bread by Rogerson, the vendor, and acceptance by Steele, the vendee. The plaintiff contended that they did; the defendant contended that they did not; and certainly the determination of the question was one for the jury, for in *Blenkinsop vs. Clayton*, *1 M.*, 331, it is ruled that the question of delivery and acceptance is one of fact for the jury, to be determined by reference to all the surrounding circumstances in evidence; the withdrawal of the facts from the jury would be a misdirection, if there were any upon which a verdict for plaintiff could be by any means legally sustained.

The case arose out of the failure of Mr David Steele. It appears from the evidence that about 27th October, 1857, Steele bought verbally from Rogerson four hundred bags of No. 2 Hamburg bread, payable by a note at three months, which he then gave and which Rogerson discounted; the bread was in Rogerson's stores, and Rogerson several times desired Steele to remove it. On the 23rd November Steele received thirty bags of the bread from Rogerson's south-side store. On the 25th

November he sold three hundred and fifty bags of the bread to the plaintiff, Boden; Boden gave Steele his notes at three months for the amount, which Boden has since paid, but unfortunately for himself, he took no steps to receive possession of the bread he had paid for until the 16th December, on which day Steele stopped payment, and Steele's note to Rogerson not being paid, Rogerson refused to deliver the bread to Boden on Steele's order. It was urged by Mr. John Little that by law a delivery and acceptance of the bread was necessary before his lien was lost to the vendor and property in it vested in the vendee; and Mr. Hoyles, for the plaintiff, contended that such was not necessary, but that there was an appropriation by vendor, which was sufficient and was to be collected from the fact that when Steele received the thirty bags he had been sent to the south-side store of Rogerson's for them; that all the No. 2 bread in that store was in one pack; that it was, therefore, sufficiently identified; and that when Boden went for his bread, Rogerson's store-keeper referred to the bread, saying "There is the bulk, Steele had thirty bags of it; there are about three hundred bags in it." Mr. Hoyles admitted further that the bread had not been counted to Steele; but, he contended that the number in the bulk being actually less than the quantity due to Steele, there was no necessity to count them, and that the whole bulk must be assumed to have been delivered to and accepted by Steele.

It is to be observed that Rogerson was not aware of the sub-sale to Boden until Steele's failure, and had not given any recognition of the sale to Boden or entered into any undertaking to hold the bread for him; but, on the contrary, repudiated Steele's right to it; the only right, therefore, on which Boden could rely was that which Steele possessed.

This is a struggle between two parties, neither of whom are to blame, arising out of their undue confidence in Mr. Steele and the only safe mode of treating it is by a reference to the current of adjudicated authorities. It would be a disastrous state of things to prevail in any commercial community if the established rule of law were to be bent by judges to meet their supposed sense of the hardship of each particular transaction.

We have considered the cases cited by both the learned counsel and several others, and we are constrained to say that the evidence was not, on any proper view of it, sufficient to justify the jury in finding for the plaintiff, and if they had so found the verdict could not stand. It is an inflexible rule that

in the absence of an express stipulation to the contrary, a sale is not completed and the property is not vested in the vendee until there has been a delivery and acceptance; and such delivery is not completed so long as anything remains for the vendor to do, whereof the quantity, quality, price, or identity of the chattel sold, is to be ascertained.

In *Hanson vs. Meyer*, 6 East, 625, vendor sold all his starch in a certain warehouse at £6 per cwt.; a large portion of it was then weighed and delivered to the purchaser, but before the residue was weighed the purchaser became bankrupt, it was held that, notwithstanding the part delivery, the vendee had no right to the possession of such residue until the weighing had been completed, as that was necessary to ascertain the price; in this case how could Boden know that his three hundred and fifty bags were in the bulk till it was counted; and there is no evidence whatever that Boden took the bulk of bread absolutely for three hundred and fifty bags, so that (if Steele had not failed) he could not and would not have looked to him for any deficiency.

In a case which passed the two Courts in Canada and through the Judicial Committee of the Privy Council on appeal, I mean *Logan vs. LeMessurier*, 6 M. P. C., 116, the decision was conformable to *Hanson vs. Meyer*. Logan, of Montreal, sold to LeMessurier a quantity of red pine timber, then lying above the rapids, stated to consist of 1,391 pieces, measuring 20,000 feet more or less, deliverable at Quebec, payable by the purchaser's promising note at ninety days, at 9½ per foot, measured off; should the quantity turn out more than stated the surplus to be paid for at 9½ per foot on delivery, and should it fall short the difference was to be refunded by the seller. The raft was brought to Quebec and tendered to buyer, but before it was measured it was scattered by a storm. Sir Frederick Thesiger in that case strenuously contended, as did Mr. Hoyles in this, that measuring was not a necessary condition precedent to the complete delivery, because the quantity was specified, the price ascertained and paid, and such measurement was only required to see whether there should be a refund by the seller or an additional payment by the buyer; but the Judicial Committee and Lord Brougham determined that until a measurement was effected the sale was not perfect and complete so as to transfer the ownership and risk. Numerous cases to the like effect might be cited, but they are not required.

It was also contended on behalf of the plaintiff that Roger-son, having received and discounted Steele's note for the bread, &c., that note being still current and not then dishonoured, he had no lien on the bread, although possibly his lien might have revived on the dishonour of the note, and was not justified in holding it against Steele's assignee, Boden; but we do not con- cur in that position. A bill or note in general is no satisfaction of the debt for which it was given unless the creditor expressly agree to accept it as cash.—*Smith, M. L., 484-5.*

"Is it to be contended," said Lawrence, J., in *Frieze v Wray*, "that if a consignee accept bills and became bankrupt before they are paid, that still he may have the goods from the con- signor?" and the Court of Exchequer in *Edward vs. O'Brewer*, 2 M W., 475, through Baron Parke, ruled that "it is" settled "that by any acceptance of bills vendors' right to stop in transitu is not taken away": and in *Addison on contracts*, page 298, the learned author when treating on this subject states "if a vendor has sold goods on credit and agreed to deliver them forthwith, or if the purchaser has given his promissary note for the price, the law will not, when the credit of the pur- chaser has been annihilated by insolvency and the security given for the payment of the price *will in all probability fail*, hold him to the strict performance of his contract with regard to the delivery, but authorizes him under such circumstances to recall the credit, and makes the acts of payment and delivery concurrent."

We therefore think, on the whole case, that there was not any evidence to support a verdict for the plaintiff, and that the Chief Justice, in directing the jury to find for the defendant, acted correctly in law. The rule must be discharged.

Mr. Hoyles, Q. C., and Mr. Whiteway for plaintiff.

Mr. John Little for defendant

1859, *January*. BY THE COURT.*Will—Lost will—Revocation of letters of administration—Proof necessary to establish contents of lost will.*

Notwithstanding that the only witness called to support the contents of a lost will, was the principal legatee under the will—he being the party who drew the will and afterwards mislaid it, the Court held the will to be sufficiently proved and admitted the same to probate.

THE proceeding was upon petition seeking to establish the alleged will and to revoke the letters of administration

Right Rev. Dr. Dalton (sworn) deposed to his being sent for to visit the deceased during an illness about three months previous to his death; request of deceased to make his will the instructions, the drawing up of the will at the time, its being read over to and approved by testator, and signed with his mark in the presence of two witnesses, Kenealy and Hogan. His (Dr. Dalton's) taking the will away with him to his residence, and putting it as he believed with some papers either in or near his desk, after the death of the testator, and upon being cited to produce the will, making diligent search and being unable to find it, could not account for its loss except by accident. He had no knowledge of deceased having revoked the will. He saw him frequently after the making of it walking about, and visited him in his last sickness. The purport of the will was to leave the property to him (Dr. Dalton) for certain ecclesiastical purposes, not named in the will but verbally to witness: the purposes were not defined.

Cross-examined.—The will ran to the best of his (witness's) remembrance:—"I do hereby will and bequeath my money and moveables and whatever may belong to me, whether now in my possession or hereafter to be given up by my debtors to be placed at the disposal of the Rev. John Dalton, as he may choose to direct for certain purposes known to him." James Callahan, a cousin of deceased, would not be allowed to be present, he was excluded at testator's desire. The will was written in another room in the opposite side of the lobby to that in which the sick man was a-bed, the witnesses were present; after reading the will to the man, thinks he said "that will do." Took no notice of a letter of Mr Hoyles's concerning the will. Believed the deceased drank hard lately, but was in perfect possession of his senses at the time of making the will. Has received about £140 belonging to the estate; not in a position to give a detail of the purposes, but generally for religious purposes. Witness

advised testator to leave something to his brother the impug-
nent then resident in Canada; he refused, saying the money was
the result of his own industry, and he could apply it as he liked.
Told impugnent after his arrival from Canada that he (witness)
knew nothing about it, there was nothing for him, might have
said there was no will but did not remember; what he meant,
and which could be gathered from his manner, was that there
was nothing for him to know anything about; may have men-
tioned 40s. being left to him (witness), that sum was not in
the will, it was given shortly before as a personal gift.

Re-examined.—Told impugnent that the property was dis-
posed of, that he had nothing to do with it, loss of time to be
looking for it. When proceedings were taken against Hogan
to recover money from him, paid to witness—witness first came
forward to protect him. Had expended most of the money
according to directions. Dunn is at the ice, and Hogan is too
ill to come.

David Kenealy was then called and sworn.

Mr. Hoyles contended on the authority of Swinburne that
there should have been at least two sufficient witnesses who
read the will before the Court would grant probate of a lost
will. Here the principal witness was the legatee, the other
was a man who could not write, and they differed in some
points in their testimony. Dr. Dalton had said the deceased
died about three months after making the will, when it was
clearly proved that it was eight or nine months, which shewed
that memory was not to be relied upon in these cases. It was
a stale matter nearly three years old. The indefinite character
of the will was also such as would make the Court slow in dis-
turb the administration.

Martin Callahan, administrator, sworn—deposed to his cousin
James Callahan having written to him, described his inquiries
and interviews with Dr. Dalton. He is brother of deceased—
had been in Canada a year and a half.

James Callahan was then sworn.

The Attorney General supported the sufficiency of the testi-
mony, and cited from *Waddilore*, 362 and 367.

The Court was of opinion that the making and contents of
the will had been satisfactorily proved and granted probate.

Attorney General for executor and promovent, Right Rev'd
Dr. Dalton.

Mr. Hoyles, Q. C., for impugnent, Martin Calahan, adminis-
trator

January, 1859. HON. SIR F. BRADY, C. J.

Waters, Public—Waters of the Harbor of St. John's; acquirement of easements in same—User for twenty years—Right to erect wharves over waters of Harbor.

Prima facie the water of the Harbor of St. John's is the property of the public, but private parties by reason of their waterside property abutting on these waters had acquired easements and certain rights over the same to which their title is as good as to the land abutting on the harbor. By the rights thus acquired wharves had been built and extended, and so long as such erection or extension did not become a public nuisance to the navigation of the harbor and did not injure the rights and properties of others, the owners of such properties have the right to extend their wharves as far as they please.

THE plaintiff's case was, that he and his predecessors, tenants of the waterside premises which he, the plaintiff, now occupied and held under lease, had by virtue of a user of twenty years and upwards, acquired the right of way to and from the wharf and premises over and upon the public waters of the harbor, for his boats and vessels; that in the year 1852 the defendants, occupiers of the adjoining premises, extended and had since continued their wharf so as to cover a great part of the water which the plaintiff and his predecessors had so used, and thereby to prevent and stop up the access which the plaintiff previously had, and deprive him of the use and benefit of his premises in so ample and beneficial a manner as he otherwise would and ought to have done.

The defendants pleaded the general issue and a statute of limitations.

The plaintiff and a great number of witnesses were called and deposed, some of them so far back as thirty-five years, to the user of the waters on the east side and at the head of plaintiff's wharf, and of the wharf which existed there previously to the fire of 1846, on the same site by the present occupier and his predecessors; that such water had not been claimed or ever used by defendants or their predecessors unless by permission. That the defendants had in 1852 extended their old wharf 55 feet 4 inches, and thus come in upon the plaintiff, narrowing the access from 42 feet 6 inches to 26 feet. That previously two vessels or one vessel and a number of boats had access to the plaintiff's water, while now only one vessel could get in, a vessel of large beam could not. That this was a great injury to the premises.

The defence was, that one person had as much right as another to extend a wharf, that since the fire of 1846 nearly all

wharves had been run out to a greater extent than plaintiff had extended his own wharf and contributed to the injury of which he complained; that defendants had to put their extension on account of plaintiff's own act; that the defendant's extension did not prevent more vessels from lying in the water than before; that the defendants and their predecessors had used the water over which the defendants had put their extension.

The defendants and their witnesses were called, who deposed that the extension was made in a direct line from the old wharf, that vessels used to be stern on at the head of it before the extension, that plaintiff had extended his wharf eighty feet, but not so as to narrow the water between him and defendants, but so as to make the way to theirs longer and more circuitous.

The Chief Justice charged the jury, that this was an action in the case in which the plaintiff claimed damages for injuries the defendants were alleged to have committed on his property by interference with certain rights of water. He (the learned Chief Justice) quite agreed with the learned counsel for the plaintiff, that this was one of those causes of action which in this country was of a very important character, and they had only to reflect for a moment on the disparity in value between property on the north side of water street compared with that on the south, to ascertain that it was in the existence of water privileges that its value was so greatly enhanced. They might see the important character of the question from the zeal with which the respective parties litigated, while he believed that at the same time there was no feeling between them except a determination to fight for their rights and to have a just and honest decision of their differences. He (Chief Justice) was also satisfied that in the decision of this case the jury would be actuated by no idea or feeling but that of arriving at a just conclusion on a case to which they had paid so much attention. His Lordship would have deferred addressing the jury until the morning if he thought there could be any serious difficulty in the case; he was bound to tell them that under the evidence and the law as he should lay it down to them, they could have little difficulty in finding for the plaintiff. *Prima facie* the water of the harbor was the property of the public, but at this time of day and after several former decisions, private parties had by reason of their water-side property got their easements and certain rights in those waters to which their title was as good as to the soil; by that right wharves had

been made and extended, and so long as that extension did not become a public nuisance to the navigable waters of the harbor, or did not injure the property and rights of others, every merchant has the right to extend so far as he pleased. Were any public wrong committed there was a public remedy, but that question did not arise in this case. Here two parties occupy adjoining premises, the plaintiff produces a large amount of evidence to prove that he and his predecessors have always enjoyed the use of the water upon which defendants have extended their wharf; that instead of the defendants claiming title they have frequently asked permission to use it. (Here His Lordship referred to the evidence). He had listened attentively to the defence of Mr. Hoyles, who he knew would, with his usual ability and ingenuity, have urged any and everything for the defendants, but he had failed to show any good ground of defence; the fact of the plaintiff's extension of his wharf was a subject they had nothing to do with at present, it was the subject of another action for trial to-morrow. Then they were told O'Dwyer occupied the public cove on the other side and charged for it; they (the jury) had nothing to do with that; the question simply was, were the facilities which the plaintiff and his predecessors had had invaded by the defendants' extension of their wharf? If so, the next question was one of damages, which would be nominal as this was the first action between these parties.

The jury retired. Mr. Hoyles excepts to the charge and contended that no erection on the public navigable waters was legal, therefore there could be no easement—every wharf was a public nuisance; that plaintiff's wharf had obstructed the way to defendant's premises, and they had a right to extend theirs to avoid the effect; that plaintiff had contributed to the injury; that the defendants, having used the water at the head of their wharf, gave them the right to erect a wharf there.

Points reserved, together with the question of the Statute of Limitation.

The jury, after considerable deliberation, brought in a verdict for plaintiff, £50 stg.

Hon. Mr. Pinsent and *Mr. A. Emerson* for plaintiff.

Mr. Hoyles, Q. C., and *Mr. Carter* for defendants.

1859. HON. P. F. LITTLE, (acting) C. J.

Landlord and tenant—Joint right of way to several tenants—Express and implied grant of way.

An express grant of a right of way for certain tenants for limited purposes and to a limited extent, "to the ~~rear~~ of the houses" excludes the presumption of an implied grant of the same way for all purposes, which might otherwise be inferred from the use of the words "all ways appertaining."

THE bill in this cause prayed for a decree for apportionment of rent; complainants were assignees of Fox, lessee of Carwithen of premises in water-street adjoining other premises of Carwithen leased by him previously to W. & H. Thomas & Co., who by virtue of their lease alleged a right of way over the land of complainants and had brought an action against them for building on the said way in which they obtained a verdict. Fox had brought an action at law for his rent against complainants who defended the action on the ground of eviction and sought apportionment. The Court held that the plea could not be sustained at law—the parties had to proceed in equity; the question now turned upon the sufficiency of the evidence and the construction of the leases, and of the privity of Fox in the verdict obtained by Thomas against the complainants. The Court took time to consider.

The following judgment was given by Acting Chief Justice Little during the last term of the Central District Court:—

The complainants by their bill claim from the defendants an abatement of rent or compensation for their loss for a partial erection by W. & H. Thomas, because part of the land leased by the defendants to the complainants, on which they have built the western side of the store and office, had been previously leased by the ground landlord, the Rev. George Jervy Carwithin, who is one of the defendants, to W. & H. Thomas, who have asserted their claim and recovered nominal damages in an action of trespass against the complainants.

It appears that on the 2nd October, 1845, Carwithin demised to W. & H. Thomas, for 40 years from October 20th, 1846, 48 feet of land on the south-side of water-street in St. John's, "bounded on the east by the wharf of J. M. Rendell & Co., by the way partly arched leading thereto," &c., and also "all usage," &c., to the said parcel of ground belonging or in anywise appertaining"—the lease granted also an easement which is the subject of the present suit, in these words, "including for

the tenants or occupants of the several houses or stores which now are, or may hereafter be on the line of the street between the said archways a right to the use of the said eastern way concurrently with the said George Jervy Carwithin, his heirs and assigns for the purposes of way between the said street and the rear of the said houses respectively."

On the 30th August, 1850, Carwithin demised to Fox and Hearn for 40 years, from 20th October, 1850, the adjoining water-side premises, which have since vested in the other defendants by various conveyances, and were leased by John Fox, one of the defendants, to the complainants, on the 20th April, 1854, for years. In the description therein given of these premises, the lane appears to have been measured in the quantity demised being 54½ feet, "bounded on the west by land of the said Carwithin, leased to W. & H. Thomas," and the following reservation is made in relation to the lane "reserving for the tenants or occupants of the several houses or stores, which now or may hereafter be on the street line of the land so leased to W. & H. Thomas, a right to the use of the way on the land hereby demised for the purposes of a way between the said street and the rear of the said houses respectively."

The complainants have built a store and office extending from the waterside towards the street, and resting upon a portion of the way towards the wharf of complainants, formerly Rendell's wharf, but these erections are 15 or 18 feet from the rear of the buildings of Thomas's which front on the street, and therefore they do not in any respect obstruct the way "between the street and the rear of the houses" on the street line of the land leased to Thomas.

Now, the substantial question which we are called upon to decide is, whether Carwithin has given to Thomas any right to the way in question inconsistent with the terms of the lease to Fox and Hearn, and that under which the complainants hold, so as to interfere with any part of the premises devised to them.

In my judgment, according to the terms of the reservation in the lease to Thomas, and the evidence in the cause, they are entitled to and have by express words a limited right of way "for the purposes of way between the street and the rear of the houses or stores" which "now are or may hereafter be on the line of street." The express grant of the way for the use of their tenants or occupants of the front houses, being for limited purposes and to a limited extent, to "the rear of the houses,"

excludes the presumption of an implied grant of the same way for all purposes which might otherwise be inferred from the use of the words "all ways appertaining," if there were proof that the way was really apportionment to the premises held by Thomas. Then the express grant of the way to Thomas is reserved in Carwithin's lease to Fox and Hearn, and in John Fox's lease to the complainants. The words used in the conveyances, touching the lane, are identical in their plain common sense application and legal effect. There can be no doubt that the tenants or occupants of the houses or stores now or hereafter on the street line of the land leased to Thomas have a right to the way between the street and the rear of the houses respectively.

But it has been contended for the complainants that Thomas having recovered against them in an action of trespass for erecting their store and office on what may be termed the waterside of the way, as it approached the complainants' wharf, therefore the complainants have been disturbed in the enjoyment of their rights by a party having a title paramount to theirs, and that such recovery is *prima facie* evidence against the defendants in this suit. I cannot assent to this proposition, because none of the defendants in this cause were parties to that action; they were not legally called upon to assert or defend their rights in such a way as to be bound by the verdict against the complainants. Nor can we now therefore properly discuss the accuracy of that recovery, though I feel myself bound to state, according to the construction I put on the leases, that it does not appear to me to have been the intention of the parties thereto that the tenants or occupants of the houses fronting on the street should have a right of way any further than the rear of these houses, and I think it would be going too far to extend that right to the water-side or the wharf of the complainants, with a due regard to the surrounding circumstances and the express limitation of the right to the rear of the houses or stores. But, as I have already said, this is a question between the complainants and Thomas not properly before us, and it does not effect the sufficiency of the grounds stated for dismissing the complainants bill, as they have not made out any case for an abatement of the rent and no paramount title has been shewn to any part of the premises demised to them.

Mr. Whiteway and Mr. Walbank for complainants

Mr. Hoyles and Mr. Carter for defendants.

1859, *January*. HON. SIR F. BRADY, C. J.

Waters—Public waters of the harbor of St. John's—Extension of wharves over same—Injury to neighboring wharf owner.

The owner of land abutting on the waters of the harbor and owning wharves extending over the said waters is justified in extending the said wharves, unless in doing so he works an injury to a neighboring proprietor.

THIS was an action brought to recover damages from the defendant for extending his wharf eighty-four feet, as mentioned in a recent case, whereby the plaintiffs had in the prosecution of their business to go a longer and more circuitous way to their wharf and premises which occasioned great delay and injury. The plaintiffs produced several witnesses and plans, and evidence of particulars, instances of delay and detention. It was contended by the defendant that the extension of his wharf had been made on his own water; that the plaintiffs still had a reasonable and sufficient way to their premises; that from the plan of the harbor produced it was shown that there were other wharves along the line longer than defendants; that Bowrings', next below his, was just about the same length; that vessels coming to the plaintiff's would not come along the wharves on the north side, but drop anchor opposite plaintiff's premises, and that, in the case of lumber boats, they would have to keep out as far as the heads of other wharves, which were shown to be as long; that there was no public injury proved to give plaintiffs a right to recover particular injury.

The Chief Justice charged the jury, expressing himself strongly as to the importance of these water rights as in the former case; they would consider the defendant justified in making his extension unless he had done a substantial and material injury to the plaintiffs. If the plaintiffs were prevented from the use of their premises in so large, ample and beneficial a manner as otherwise, they are entitled to a verdict, if not, the defendant should have their verdict; the amount of damages he would leave entirely in their hands.

The jury retired. Mr. Pinsent takes similar exceptions as in the former case. Mr. Hoyles excepts on the ground that damages attached in law by the creating of the circuitous way. Points reserved.

Verdict for plaintiff, £50 stg.

Mr. Hoyles, Q. C., and *Mr. Carter*, for plaintiff.

Hon. Mr. Pinsent and *A. Emerson* for defendant.

1859, January HON. MR. JUSTICE SIMMS.

Way—Right of way—Uninterrupted user for twenty years—Dedication of way by tenant.

An uninterrupted user of the land of another for twenty years, with the knowledge of the owner, constitutes a right of way over the same.

THIS was an action on the case for obstructing a right of way. Damages laid at £20. The plaintiff's declaration contained two counts: 1st, that the plaintiff being possessed of land in Saint John's had a right of way unto, into, through and over a close of the defendant unto and into a common and public highway, and so back again from the said common and public highway unto, into, through and over the close of the defendant and thence unto the land of the plaintiff for himself and his tenant and servant to go, return, pass and repass on foot at all times at their free will and pleasure, which right of way the defendant on the 22nd December, 1858, obstructed by digging up the soil of said way. A second count was for an obstruction of a right of way *towards* the plaintiff's land.

Defendant pleaded the general issue. Attorney General opened the case to the jury and called Patrick Haggerty, who proved a right for over twenty-four years. James McCarthy, Hon Dr. Carson, Michael E. Slattery, Hon E. Hanrahan, John Sweeney, John Casey (plaintiff), and Patrick Burke, were also called to sustain the plaintiff's claim.

Mr. Walbank, for the defence, contended that the right was always exercised by license from defendant, and that a few years before the death of plaintiff's father he and defendant entered into a verbal agreement by which this right of way was given by defendant to the father of plaintiff at one shilling a year rent. Messrs. Sinnett and Haggerty, tenants of defendant, proved the way to be a private way for the use of defendant's tenants. Hugh Hamlin (defendant) proved the license and the agreement for the use of the passage-way with old Mr. Casey at one shilling a year.

The Attorney General having closed to the jury, his lordship Judge Simms charged. The action was one of case for obstruction for a right of way, claimed by plaintiff to have been exercised uninterruptedly for over twenty years. To sustain this claim there must be evidence of an uninterrupted user for over twenty years. The defendant denies the right upon the grounds: 1st, that when the right was first exercised the land was in the possession of a lessee, now the law does not allow a lessee to

destroy or make away with the rights of a lessor, so that any acts or license of lessee done or given by him to third parties without the concurrence or connivance of the lessor, the lessor could not be bound for. The 2nd ground of defence is the agreement said to be entered into between old Mr. Casey and defendant, whereby the right of way was given by defendant to old Mr. Casey for one shilling a year. If you believe the defendant's testimony you will conclude that there was not an uninterrupted use for over twenty years, and the defendant will be entitled to your verdict; but if you come to the conclusion that the plaintiff or his tenants exercised an uninterrupted right of way over the land in question for over the past twenty years, you will give him a verdict for nominal damages.

Verdict for plaintiff, sixpence damages.

Hon. Attorney General and Mr. Flood for plaintiff.

Mr. Walbank and Mr. Whitway for defendant.

GOFF v. BARRON. *

1859, *January*. LITTLE, C. J. ; ROBINSON, J. : SIMMS, J.

Fishery—Receiver of voyage—Fishery servant—Wages—Insolvency of employer—21 Vic., cap. 9—Notice of shipping of servant—Practice—New trial.

Where in an action by a fishery servant against the receiver of the voyage, a verdict was given to the plaintiff, the Court afterwards set the same aside on the grounds that the notice required by the statute to be given to the merchant of the shipping of the servant by his dealer had been inadequately proved.

THIS was an action of assumpsit brought to recover £27 against defendants, as receivers of the voyage of Dunn and Goff, planters, of Salmonier, and dealers of defendants, and whose servant plaintiff was during the late fishing season. This action was instituted by virtue of the 3 section of 21 Vic., c. 9, which enables a servant to follow the voyage into the hands of the receiving merchant; and, in case of the insolvency of the planter to have the same remedy against the receiving merchant as he

* All the principles involved in this case are fully discussed in the judgment of Hon. Mr. Justice Emerson in the case of *Parsons vs. For. Supreme Court cases*, March 10th, 1868. [EDITOR.]

would have had against the planter, (his master). This case came before the Court by *certiorari*. The plaintiff's bill of particulars set out for wages at fishery £15 18s., and wages current and expenses from time of demand for payment up to time of trial £11 12s., the latter item however was struck out; the Court holding that such a charge could under the statute be made only against the master or employer and not against the receiver. The plaintiff was called who proved his services faithfully performed, the inability of his employer to pay his wages: the voyage being turned into defendants who had paid all the other servants, one of defendants having made a part payment to plaintiff of 12s., with a promise to pay remainder next day, he went into the office to get paid, produced his shipping paper to defendant, James Barron, who told plaintiff to call to-morrow and get settled with, plaintiff said he would like to get 10s. then, when James Barron told book-keeper to pay him half a sovereign. In his cross-examination he said he lived with Dunn and Goff, who were both related to him, one a son, the other a son-in-law. The shipping paper was only signed by one of the partners, he could not read or write, both made marks to shipping paper, which was drawn up and read over to them by Mr. Curtis. He never got an order from his employers on Barron for his wages; don't know if notice was given to defendants of his being a shipped servant. Goff's written examination was then read, which proved the *bona fide* shipping of plaintiff, if they had not him they should have hired some one else; also, their insolvency, no notice was given to Barron of plaintiff being a shipped servant. An attempt was made for a non-suit on two grounds: 1st, The want of sufficient proof by the insolvency of Dunn and Goff; 2nd, The want of notice being given (pursuant to the statute) to defendants of plaintiff being a shipped servant to their dealers Dunn and Goff. The first point was disposed of as groundless, the second (after argument) reserved. It being contended by the plaintiff's counsel that although there was no proof of direct notice, yet the same might be inferred from the fact of part payment and promise to pay, &c., and was a question for the jury.

Defence,—That the case was one of fraud, the claim was a cooked one between the plaintiff and his employers, who are his relatives, and who do not make their appearance in Court. And no notice whatever in conformity with the terms of the statute was given to defendants of plaintiff being a servant of their dealers. James Barron was called—he nor his partner never

knew of plaintiff being a shipped servant of Dunn and Goff. Don't remember the payment of 12s., but denies any promise of his to pay.

Terence Barron, book-keeper, was in office when plaintiff produced his shipping paper for payment. Mr. James Barron was there, was not told by him to give plaintiff anything nor did he promise anything, but he (witness) out of charity gave 12s. to plaintiff. On his cross-examination, he was not in the habit of giving 12s. in charity; knew nothing of plaintiff before: charged 12s. against plaintiff in the books of the defendants.

Chief Justice Little in charging the jury, warned them against the bad principle of giving a verdict for plaintiff because he was poor and the defendants the reverse. It was essential that the merchant should be protected as the servant. The notice required by the statute has been very inadequately proved, but it was for the jury to infer from circumstances disclosed by the evidence if such notice had been given.

Verdict for plaintiff, £15 18s.

This verdict was on a future day after argument set aside, and a new trial granted, upon the ground of the verdict being contrary to evidence.

Mr. Flood for plaintiff.

Mr. Little for defendant.

IN RE THE WILL OF JOHN HENNEBURY.

1859, *January*. BY THE COURT.

Will—Lost will—Proof of contents necessary to establish will and admit to probate.

The Court, in the absence of all proof of the execution of a will which has become lost, will not admit the same to probate.

Mr. PINSENT, for the next of kin, applied in the alternative either for administration in the common form with the will annexed, being a paper written admitted by consent of all the next of kin to contain the provisions of the will of the deceased (a minor excepted, who was supported by the petitioner, and admitted to be an equal legatee under the will). The alleged will was made about twenty-five years ago, since lost, and no proof by witnesses of its execution: but it was always

understood and admitted between the family to have existed and the next of kin to be entitled in manner set forth in the paper-writing. The Court held that it could not, under the circumstance of absence of all proof, admit the paper-writing to probate, but granted administration in common form.

GEORGE, JOHN AND JAMES SIMMS v.
MARISTANY Y ELIAS.

1859, *January*. HON. P. F. LITTLE, ACTG. C. J.

Practice—New trial—Setting aside verdict—Excessive damages.

Where in an action of assumpsit for £356 11s. 8d., being a claim for salvage services, the jury found a verdict for the plaintiff for £266, the Court set aside the verdict on the grounds of its being excessive, the defendant paying the costs of the previous trial.

MR. HOYLES opened the case to the jury. The plaintiffs were young men residing at Trepassey; the defendant, a Spaniard who had been captain of the Spanish barque *La Plata*, which was wrecked at Trepassey in December, 1857; and the present cause of action arose out of a claim for salvage and other meritorious services rendered by the plaintiffs to defendant in saving from the wreck and bringing to St. John's a large quantity of specie. It would appear that this vessel, the *La Plata*, was coming from Havannah bound to Messrs. Ridley & Sons of Harbor Grace for a cargo of fish, and was stranded on Trepassey beach; the captain and crew saved themselves by means of a rope; at this time the sea was running mountains high, and the *La Plata* was exposed to the full force of the waves which were making a full sweep over her. Immediately upon the captain and crew getting safe on shore, they went to the house of Mr. George Simms, the magistrate at Trepassey, leaving the vessel to her fate. While the captain was at Mr. Simms' house taking refreshments, &c., he made known by signs that there was a large quantity of specie on board, and it became a matter of consideration to these young men (the plaintiffs), who are the sons of Mr. George Simms, to get this specie safely out of the vessel before the fact of it being on board became known to the people, who had congregated in large numbers around the wreck. The plaintiffs urged the captain to hasten with

them to rescue this money, but he appeared to be perfectly indifferent. One of the defendants went to the telegraph office to telegraph the news of the wreck to the Spanish consul and the consignees, while the other with a few respectable men whom he requested to accompany him, not telling them there was money on board, approached the wreck; the captain and mate also went with them. With great difficulty they got on board, after which John Simms, the captain and mate went into the cabin, George Simms remaining on deck to prevent interference or intrusion. The captain stowed a large quantity of gold about his person. John Simms pointed out the danger of such a proceeding, after which it was wrapped up in a tarpaulin, and by the skill and judgment of these young men safely lodged in Mr. G. Simms' house. It was there counted, packed and sealed, where it remained some days, and was subsequently brought on to St. John's on the backs of the plaintiffs, who were accompanied by the captain, a distance of over 80 miles, at no small labor and peril to plaintiffs. A sum of £3000 was thus saved to defendant through the energy, skill and prudence of the plaintiffs, and at no small labor and risk to them. This large amount of specie was conveyed by these young men from Trepassey to St. John's through a wild and uninhabited tract of country, and throughout the whole journey they were wholly unassisted by the captain and his mate. They would hear that during the stay of the captain at Trepassey he professed the greatest gratitude for the kindness he had received, as well as for the efficient and seasonable services rendered by the plaintiffs in saving and preserving this money, and gave the strongest assurance that liberal remuneration would be awarded them; but upon their arrival in St. John's, when all the peril and danger was past and the money in safety, all former service and kindness are forgotten, and the trumpery sum of £50 is offered, scarcely a sufficient reward for physical labor alone. The defendant's conduct throughout has been most unreasonable and ungrateful, and in his written evidence he has not failed to resort to all unfair means to criminate the plaintiffs and Mr. J. Simms in a manner highly unjust and discreditable. This case was now before the jury, from whom the plaintiffs sought to obtain that justice which the defendant had declined to accord them.

George Simms—Am one of plaintiffs. John and James are my brothers. The *Plata* went on shore at Trepassey, 22nd

Dec., 1857. Was there, and saw what took place. I saw her first coming in the bay, wind S S. W.; there was a heavy sea. She was running directly for the back of the beach; there is no shelter there with that wind; had the vessel gone on the eastern side of the peninsula not a soul would have been saved. She was driven or ran on shore through the stress of weather. She no sooner stranded, than the crew left her by means of a rope which was thrown on board by parties on land; the sea was running very high; one sick man of the crew was left behind, he afterwards got out of vessel and fell in water, and was saved at the risk of men's lives; Spaniards did not assist him. The captain and crew went to my father's house; I was told money was on board and sent my brother John to the house for the captain; captain came in about half an hour. In the meantime my brother James and I remained on board watching the vessel; several persons got on board of her and commenced cutting the ship; I warned them to desist and they did desist. The captain afterwards came down with my father and brother John, and we got persons out of vessel, by aid of rope I and others got on board; the vessel was at the time heaving in and out, and the sea washing inside of her. Captain, mate and John were the first on board; my brother James and self followed their six men. John went with captain in cabin; I remained on deck to prevent intrusion until the specie was landed; the package containing the money was passed from the ship to my father, and from him to my brother Alfred, who sat upon it on beach; it was afterwards safely lodged in my father's house; after that we saved all the captain's and mate's clothing; there was no chance of being saved, she hadn't been twenty minutes on the beach when she was bogged, the sea was beating in and out of her. Neither my brothers nor I cut the ship; was not on board ship after taking the specie. After the money had been secured in my father's house for some days it was taken on to St. John's by my brother John and myself; John carried one half and I the other. The captain and mate accompanied us, but never gave us the least help or assistance; we were obliged to hire a horse and catamaran for captain; he rode all the way to St. John's. I paid the expenses of all upon our arrival at St. John's. I offered all the specie to Mr. Nugent, secretary to the Spanish consul, who refused to receive it, it being as he said after office hours, and told me to call up to the consulate in the morning;

I then lodged it in the Union Bank; not agreeing with defendant about salvage, we handed over the money to Mr. Robinson, then counsel for defendant, to abide the decision of a court of law.

Cross-examined—Was at wreck from first to last; my father was not present throughout; when I sent for captain had not seen nor did not see my father; my father nor captain not then on beach; father not there when the crew landed: he wasn't there for an hour and a-half. They met my father on the way to his house; he then went to the telegraph office, not going to the ship first, he telegraphed about the loss, &c.; from telegraph office father came to ship. My father and mother walked towards the wreck and met captain and crew half way, who returned with my mother; at the time they met father not in sight of wreck. Father at wreck before return of captain, and took an active part in looking after vessel; the specie was handed to him from the vessel. In the absence of the captain, I was engaged watching the vessel; during captain's absence there was a good deal of running rigging taken ashore. Can swear to my knowledge there were no Napoleons taken. Was present when my father ordered men out of vessel, which was done at captain's request. It was partly under my father's orders my brothers and I acted; my father knew of the money being on board; we had six persons with us besides ourselves; can't say there were any persons against us; there were from 50 to 100 persons on the beach. I think the captain went first on board vessel, then I, brothers, and six men followed. The captain, mate, and John went first in cabin; I believe there was a state-room inside the cabin; was not in state-room until after captain left it; I and all but John remained on deck; the money was handed over the side of the vessel by Sutton; the money remained on the beach more than an hour, Alfred sitting on it, when father sent the boatswain (otherwise called the second mate) with it to the house; the first and second mates went with the money to the house. After tea the money was counted; it consisted of doubloons in gold; they were then sealed up in a bag; there were two seals, one the captain's, the other my father's; after that the bag was locked up in a closet. The captain and crew remained at father's house until 2nd January. The bag was opened a day or two before the captain left; was present at opening; both brothers who are plaintiffs, and the captain, were present also; the money was again

counted and a portion taken with the captain's assent to furnish funds for our own journey to St. John's; 75 doubloons were taken to pay the salvage and other necessary expenses. The account shewn by my father to the captain was assented to by him. I and plaintiffs are totally disconnected from our father, we live on our own account; did not act altogether under my father's advice and directions; myself and the other plaintiffs live in his house with him. It was at the wish of the captain we came on to St. John's with the specie; after taking out the 75 doubloons the remainder was sealed up in canvas with father's and defendant's seals, and were placed in the closet until they were put in our knapsacks to bring to St. John's. The account given to Maristany is in my handwriting, and he assented to it; this is the account (account produced). My father is justice of the peace and clerk of the court; took an active part in saving materials. My father carries on no business; I and brothers do; we have no spoons of captain, can swear they were all given to him in my presence; on arrival at St. John's received a note from consul to hand over money.

Re-examined—Never received remuneration either for salvage or services in conveying the money to St. John's. My father was appointed agent both for captain and consignees (Ridley & Sons); he collected all the property and arranged all with the salvors. Neither the captain nor crew assisted in saving the property; the captain chartered a vessel and sent all his crew on to St. John's, but would not send on the specie by it; a boat, chain and anchor, with two muskets, some sails, spars, &c., remain in father's store ready for delivery to the captain or his agent being applied for; £156 18s. was paid to people there for salvage; £123 17s. 6d. has been charged for my father's commission as agent, but we have no interest in that; £5 was paid to guides through the country. The captain was perfectly satisfied with the account shewn him, he understood everything in it; captain said had he been lost on the coast of Spain he should have to bury his money, else it would be taken from him. He always expressed himself grateful before leaving Trepassey, and made my father present of cigars.

By the Court—The chain, boat, anchors and muskets, &c., are in the store, and only await the captain's application for them; there is no salvage on them; the captain could understand English by means of our Spanish and English dic-

tionaries and signs sufficient to enable him to understand the account.

John Simms was next called and sworn, and corroborated in most particulars the testimony of the preceding witness; he was examined and cross-examined at great length.

John Sutton spoke as to the stranding of the vessel, her hopeless state; he was one of the six employed by Mr. Simms to go on board vessel to protect property; he did not know there was specie on board until after it had been saved; is relative of Mr. Simms

Michael Sutton speaks to the same effect as John respecting the wreck, &c., and salvation of property; is relative of plaintiff.

The plaintiffs' case being closed, Mr. Pinsent, for the defendant, addressed the jury at considerable length, first describing the circumstances of the wreck, and then commenting upon the evidence of the plaintiffs, and contending that upon their own showing, assuming everything that they and their witnesses stated to be true, the services rendered to the defendant amounted to mere assistance, not of the character of salvage, but of work and labor only, for which a very small sum would be adequate remuneration; and that they and their father, Mr. George Simms, had in the abstraction of seventy-five doubloons (£297 7s. 6d.), and by the proceeds of the wreck (£13 19s. 6d.), and the property they had retained, appropriated a sum far exceeding anything they were entitled to; that the charges made by the father, who in this transaction could not be separated from the plaintiffs, should be considered in arriving at their verdict; that it was an outrage upon an unfortunate and defenceless man, under the circumstances described, to have taken the money and property they had, and they exhibited an unparalleled degree of shamelessness in seeking for more. That by the statement of the plaintiffs, the captain and his mates had not ceased to have possession of the specie, that only conferred the right of lien, and without possession there could be no lien, therefore no salvage services had been performed.

The learned counsel then referred to the law of salvage and the distinction between that and work and labor, the nature of the compensation in each case being very different; and then described the evidence for the defence, which had been taken under circumstances very unfavorable to the defendant, he (the defendant) after waiting here for months was obliged to leave,

his testimony being first taken before an examiner with the assistance of a translator; that a commission had to be sent to Spain to examine the mate and boatswain or second mate, but one only could be found, whose evidence in chief particulars, especially on the question of saving the specie, perfectly coincided with the captain's. That by the evidence for the defence being taken in this way, the plaintiffs had been made aware before trial of defendant's case. That from the testimony so produced, it would be seen that the Simmses had taken no part in saving the money, which was solely attributable to the captain and his mates; that therefore the plaintiffs had no claim. The learned counsel here went into the details of the evidence, and said that it revealed a case highly disgraceful to the plaintiffs, such as to deprive them of any favorable consideration at the hands of the jury. As to the bringing of the specie from Trepassey to St. John's, that was carried by the plaintiffs contrary to the captain's desire. The plaintiffs were employed by their father, they should look to him, he had charged for it.

Mr. Pinsent concluded by impressing upon the jury that the rights of foreigners upon British soil were co-equal with our own; he then referred to the peculiar relations of Spaniards with Newfoundland, desiring them to do with defendant as they would be done by, to avert from the country the evil consequences of the repute such a line of conduct as that pursued by the plaintiffs and their fellows must if sustained entail, and to teach foreigners to feel that their civil rights would not be violated in a British court by a British jury.

The following answer of the Spanish consul to an application of the plaintiffs for salvage was then read, after which the written evidence of the captain (defendant) and mate were read.

St. John's, 7th January, 1857.

Gentlemen,—In order to comply with the instructions of Her Majesty the Queen of Spain in such cases, it is necessary to hand over to the Consulate of Spain any effects, money, &c., saved from the wreck of the Spanish brigantine *Plata*. You will therefore please deliver to the Consulate of Spain, at three o'clock this evening, money which you with the captain and mates of the *Plata* have brought from the said wreck. The salvage will be paid afterwards to those who prove the rights to it.

(Signed), DE MARQUES DE CABALLERO, &c., &c.

MESSRS. GEORGE AND JOHN SIMMS, at the Hotel de Paris.

Examination of the plaintiff taken *de bene esse* according to the rule of court annexed.

Examined by Mr. Pinsent—I left Havana on the 2nd December, 1857, in the polacca schooner *Plata*; she is 198 tons burthen, 5½ months old, worth with her materials \$20,000, bound for Harbor Grace, Newfoundland, calling at St. John's for orders. I got soundings on this coast on the 22nd Dec., 1857, between Trepassey and Cape Race; wind was S.S.W., bad weather, hail and fog. I then ran as I supposed (on the 22nd) for Cape Race, but the current took us to the westward; made the land between ten and eleven on the morning of the 23rd, between Cape Race and Point Mutton. On the 23rd when we made land, the wind was strong from S.S.W., heavy sea, foggy and snowing; at first I did not know the land, it was covered with snow; I found land all round us; I afterwards recognized it; we were embayed. I then saw a beach and ran the vessel on it to save our lives and put the vessel in a place to save her if possible; ran on the beach composed of sand and small sand, not particularly fine sand; there was very little sea there close in where she grounded, the force of the sea was broken by a shoal of some rocks; she was lying broadside on the shore, but not much heeled over; she did not strike on any rock; at that time there was no water in her (two o'clock p. m. on the 23rd); it was about high tide. I saw a good many people on the beach as I approached; saw men first, afterwards women and children. From the position in which that vessel was stranded, could she have been got off? Yes, very well. By what means? By sending a message to the consul, he would have sent on carpenters, and I would have saved her. Might Mr. Simms and the others there have saved her? Yes, Mr. Simms might have saved her, but his ideas were very different. Might she have been hauled up? She was quite high enough without being hauled up. Could she have been got off at high-tide by Mr. Simms and others using proper means? I don't know the capabilities of Mr. Simms for getting off vessels, but it would require a person who understands it to undertake it. Do you understand? I have had experience enough to try some plan. Could you have carried out a plan with the assistance of the people there? I don't know the capacity of the Trepassey men, but I could have got men from St. John's to do it. What plan would have got her off? Put spars under her and slide her off. There was no bad weather after the

vessel went on shore during my stay at Trepassey. After the vessel struck the boatswain threw a rope on shore, which was laid hold of by the man on the beach, and by means of which we all got on shore; there were a great many people on the beach. Upon landing I saw a gentleman who appeared to be different from the rest; I ran and embraced him and sought assistance from him; this gentleman was the defendant. He made signs to me to go and change my dress; I made signs to him that I had \$10,000 on board; he made signs to me that he was the chief of the village, and would watch while I changed my wet clothes; then two ladies came and wanted me to go with them; I said no, I would watch. Mr. Simms made signs that he would watch, and I went with the two ladies; the whole crew went with me; we all went to Mr. Simms' house (myself and the rest of the crew with the two ladies). I afterwards found out that one of the ladies was Mrs. Simms, and the other a lady staying in the house. All the crew and myself were wet and suffering from cold. I, the boatswain and mate got back to the vessel again as quick as possible after changing our clothes. When I got back I found the coffer on the starboard side nearest the shore had been cut off by hatchets; that the shrouds had been cut on the larboard side, and the people had commenced cutting the masts; the only sail that was loose was the topsail, which was close reefed and hanging down on the cap or other yard; I saw defendant there; I requested him to send away the men who were destroying my vessel; he touched me on the shoulder, and said "bye-and-bye." Did he use any efforts to stop the destruction? I saw that he did not and then I went on board to save the money; when I got down in the cabin I found five men there; all, as much as could be broken, was broken, the clothing thrown about; drawers, closets, places we had to keep our clothes pulled out and broken; the door of my stateroom, which had been locked, was broken open; I did not know who three of these men were, but afterwards found out that two of them were Mr. Simms's sons; when I approached they stopped their proceedings and looked at me; I went into my stateroom with the object of saving the money; I found my desk which contained my papers and the money broken open; the accounts and papers were thrown out upon the floor of the cabin; I found the handle of the drawer (which was glass) broken, and the drawer open about one-quarter of an inch; this drawer had

the money in it; it had no lock to it; it was in a desk which had a lock, which was broken; I had 80 odd Napoleons under my pillow; they were gone with my watch, which was in the same place; in the drawer above mentioned with the handle broken, there was \$10,000 in doubloons; I called the boatswain to get a nail, with which I forced off the side of the drawer; the boatswain got a bag and held it while I put the money into it; I then tied up the bag and wrapt it up in a seaman's jacket; (I did this that the people might not know what it was; I went on deck and told the boatswain to remain in the cabin; I took the bag and jacket with the money from the boatswain, I being on deck he in the cabin; I then called the boatswain on deck and told him to go on shore; I then handed the money on shore to the boatswain, and then went and called the mate and told him to stop and watch the money on shore; the money was in the jacket on the beach watched by the mate; in my stateroom there was only the boatswain and myself at the time of the removal of the money; no one asked me where the money was; I was on the beach some time; when it began to grow dark I told the mate and boatswain to take the money to the house where we had been to change our dress; the mate and boatswain went along with the money; I remained on the beach until Mr. Simms told me to go to his house; Mr. Simms had been on the beach all the time; it was some time after the mate and boatswain left with the money that Mr. Simms and myself went to the house; I found, on coming to the house, that neither the mate or the boatswain had arrived, but they came in about five minutes after; they then came to me and gave the bag of money still wrapt in the jacket; I put it on a chair in the dining room; we then took tea; I made signs that I wished to have the money counted; I put it on the table and counted it and found one doubloon missing; Mr. Simms, Mrs. Simms, their sons, and, as I believe, all the family, were present at the counting; Messrs John Simms and George Simms were there; we put it in packages of 80 doubloons each; put it then in a bag and tied it up, sealing it with two seals, my own and Mr. Simms's; I made signs to defendant that I wished to have it locked up; we put it into a closet; Mr. Simms locked it up and took the key; I asked him for the key and he refused to give it; that is, I made signs for him to give it to me; he understood what I wanted; he said "no," and put it in his pocket; slapping me on the shoulders we then went in and

warmed ourselves by the fire; we all went to bed in due time; on the next morning I went to look at the vessel and found the masts cut away, the yards and all the gear thrown on shore, and they had commenced breaking and cutting away the bulwarks; the hull was unhurt, while all the copper was gone from the starboard side; the hull was lying in the same way as the day before, but no part in the water—high and dry on the beach—the vessel was then whole and might have been put in the water; I found a great many persons there, but I did not know any of them; on the 24th I made signs to Mr. Simms that I wanted to send my crew to look after the vessel; he made signs to me that it was too cold for them, and that he had twelve men for that purpose; I don't remember whether Mr. Simms was present or not when I first went down this morning, but I saw him there a short time afterwards; I made signs to him to prevent the men destroying my vessel; Mr. Simms laughed, and said "bye-and-bye"; I did not see him do anything to prevent them; I saw him talking and laughing with the men who were there; John and George, jr., were then employed in the same manner as the rest of the Trepassey men who were there; the next being Christmas Day we spent in the house; on this day defendant showed me some papers; I don't know what they were. What was the appearance of the papers? They had Queen Victoria's name and large seals upon them; one of Mr. Simms's sons got a dictionary and showed me by it that he was a magistrate; on the 26th I saw some men (I don't know who) cutting a hole in the inside of the ship to get out (as I suppose) the tank; they were otherwise continuing the destruction of the vessel outside and in; Mr. Simms was present at this time; I saw John and George Simms, jr., on this day with axes in their hands cutting the vessel; on the 26th they were making heaps of the things, dividing and taking them on a cart; on the 27th there were not so many persons there; on the 28th I stopped in the house all day; the hull up to this time had suffered nothing by the sea; I left Trepassey for St. John's on the 22nd or 23rd of January; the sea had done no damage to the vessel up to that time; Sunday before I left for St. John's Mr. Simms called me in, took the bag from the closet, broke the seals in my presence, took out the packages of doubloons and counted them, and they were made up of packages of 46 doubloons each, and the defendant showed me two knapsacks, in which he told me it

might be brought to St. John's; when we had counted and packed the doubloons in packages, Mr. Simms showed me an account; all I understood in the account was five per cent.; I appeared to be charged with something over \$1,200; the account was made up in pounds; I signified I did not understand it; defendant took two packages of doubloons (together 80 doubloons) and said that was all the same; he gave them to Mrs Simms, who took them up stairs; I expressed by signs that I did not understand the account, but that if the consul approved of it it would be all right; I made signs to Mr. Simms that he was not to take the doubloons, that it must be settled by the consul; I refused to receive the account as I did not understand it; during the time I was there defendant asked me to sign three documents: I told him I did not wish to sign them, and he said I must sign them; I made signs to him that I did not wish to sign anything I did not understand, but he made me sign them (all three); I did not understand them; when defendant kept the money and presented the account John and George Simms jr., were present; defendant then said a good deal to me about the account, and the charges in the account, but I could not understand him; all I signified was something about the consul; two days after we left for Saint John's; John and George carried the money; I made signs to defendant that I and the mate would carry it tied round our waists; Mr. Simms said no, and that his sons would bring it, which they did; John and George carried it in knapsacks; I, the mate, and George Simms, jr., and two guides, came as far as (I think) Ferryland together; the guides left us, and we came on to St. John's; we were five and a half days coming; on my arrival here they took me to Toussaint's hotel; John and George Simms, jr., promised on the day we arrived to meet me at the Spanish Consul's at the appointed time, but they did not come; while the Simms, John and George, remained in St. John's they did not give the money; on the 23rd December I asked Mr. Simms to send a message by telegraph to the Spanish Consul; he did not send it; there was a small fore-and-after hired by Mr. Simms to bring round to St. John's the things belonging to the vessel at my request; she had not left Trepassay when I left; she arrived here a short time after me, bringing some of the things with the boatswain and the rest of the crew; the boatswain gave me a list of what was brought; defendant put down £200 on a piece of paper and showed it

to me, and I understood that was the charter for her to bring round as much as she could; I don't know what arrangement was made with the salvors; Mr. Simms did not say anything about keeping anything back for salvors; the fore-and-after only brought a small proportion of the said things; the things that were given me were of the least value.

Adjourned until to-morrow at half-past 10 o'clock.

October 12.

Adjourned by consent to to-morrow at 10 o'clock.

October 13.

I don't know what proportion of the whole of the things saved was handed to me; the list marked A is a list of the things brought to St. John's in the chartered vessel and handed to me; and the list B is a correct list of the things saved at Trepassey; I had a dozen silver spoons on board the *Plata*; I saw them for the last time in Mr. Simms' house; before I left Trepassey one of the ladies in the house showed them to me; they have not been sent to me; he asked me one day if I missed anything, and I said yes, the spoons—when Mr. Simms said he would look for them; he did so, and afterwards one of the ladies showed them to me; I consider that it is Mr. Simms' duty, from his office, to render his services in and about the *Plata*, and saving her and her materials, without pay. Irrespective of Mr. Simms being an official, what is the value of his services rendered on the occasion in question? I have no idea of that, I leave it to the consul; I don't know who employed Mr. Simms' sons about the wreck or going to St. John's; I did not employ them; all the family were present, including the sons who are suing me, when Mr. Simms, sr., presented the account charging the 80 doubloons; I don't know who made out the account; Mr. Simms' sons, John, George and James, took no part in saving the specie from *Plata*; I came myself with my mate and boatswain.

Cross-examined by Mr. Hoyles:

I am thirty-four years old, and have been master six years; was never on the coast before; I was never wrecked before since I have been captain or master; Ridley & Sons were my consignees in Harbor Grace, and I wanted defendant to tele-

graph to them as well as to the consul of the wreck ; I received an answer from consul, and may have received one from Ridley in the same way, but do not remember having done so ; defendant showed me several telegrams, but I don't know if the one produced is one or not as it is in English ; defendant did not tell me anything about Ridley's telegram that I understood ; but the consul's answer he gave me ; it was in Spanish ; I did not tell the defendant what the consul's telegram was ; he did not ask me ; I did not do so because I could not make him understand it ; Mr. Simms did not tell me he had sent on the spoons, but he told the boatswain that the spoons had been given up, and when the boatswain came to St. John's he told me of it ; at the time we ran on shore we were under treble reefed topsail and storm staysail, trimmed aft ; I and my crew stayed at defendant's house all time we were in Trepassey—myself, mate, boatswain, at defendant's table ; the doubloons were in packages of 80 doubloons each, in the drawer piled together ; I had counted the doubloons in Havanna ; I never recovered the doubloon spoken of before as having missed, nor of a small bag of money which I missed containing the Napoleons ; I had no money in Trepassey except the doubloons ; the mate, I believe, had some money, but I did not see him with any ; Mr. Simms, the defendant, made me sign these documents in Trepassey ; I had a crew of twelve men, including the captain—nine Spaniards and three natives of Manilla ; between 10 and 11 of the day we went on shore we made the land, and struck about 2 o'clock ; some people brought my watch to defendant and he gave it to me ; the watch was between two beds at the head of my bed ; the money (small bag of Napoleons) was under the pillow ; the small bag of money I never got ; I had other money beside the doubloons which I saved—eight Mexican doubloons in a little bag, which I saved and brought on to St. John's with me ; the \$10,000 in doubloons above mentioned belong to different parties ; they were given to me by friends of mine in Barcelona and elsewhere to trade with for them ; I am responsible ; part belongs to myself ; the amount was to be worked by me for the benefit of all ; the amount belonging to me was £150—the rest belonging to friends as before mentioned, in shares ; Don Francisco Oliver is one of the owners ; my own share was only £150 ; I was present when they were making heaps of the stuff saved, but I don't know whether I was present at the sale of the vessel ;

I don't know what she was sold for, or whether she was sold or not; no one told me that she was sold; I pay $2\frac{1}{2}$ and $2\frac{1}{4}$ commission for getting my business done, that is, $2\frac{1}{2}$ or $2\frac{1}{4}$ for purchase, and $2\frac{1}{2}$ or $2\frac{1}{3}$ for sales of cargo, that is five per cent. on the whole business; defendant showed me nothing in the account in Trepassey charged as having been paid the men as salvage; when Mr. Simms showed me the account in Trepassey he did not show me the commission in it; I noticed it myself; I do not know that there was anything charged therein as money paid for salvage, as I did not understand it; I don't know if Mr. Simms was bound to find me and my crew in diet for nothing; I don't know if there was anything charged in the account for guides to Ferryland, nor if anything paid for telegraphic dispatches; I did not understand it; I said nothing about the charge of commission which I saw in the account; I said nothing to it; defendant said nothing to me about the commission; I don't know if the right number of doubloons were credited in the account to me; I can't say whether the account marked C is the account shown me by defendant or not. Is there anything about commission in this account? I do not see anything in this account like commission charges as in the other account produced at Trepassey; the signature at foot of exhibit D is my name and hand-writing; from the day I arrived at St. John's I put myself under the consul's directions, and did everything as he directed; and the consul acted for me in everything connected with the wreck and the money; the signature at the foot exhibit E is the name and hand-writing of the consul; I have received no jewellery of any description since I came to St. John's from the Simms's; don't know if Mr. Robinson has; Mr. Robinson was my lawyer; don't know if Mr. Robinson has received the doubloons; they called me one day into his office and counted them out; I don't know what was done with them; Mr. Robinson and the consul's secretary counted the doubloons; I don't know with certainty the number there were; I afterwards went with consul's secretary with the doubloons to the bank; I was the owner of the *Plata*

Re-examined by Mr. Piusent.—I am responsible to the various parties who own the \$10,000 in doubloons; the only thing that I observed in the account shewn me at Trepassey was 5 with two o's after, which I took for 5 per cent. commission, and which I do not see in this account.

Answer to Mr. Hoyles:—Exhibit E is telegram from the consul to me in answer to telegram sent by Mr. Simms; exhibit C I never sent before.

(Signed), PEDRO MARISTANY Y ELIAS.

Taken and sworn before me, at St. John's,
aforesaid, 13th October, 1858.

W. V. WHITEWAY.

Mate's evidence in answer to questions sent by commission :
Yes, I do know the parties; I was on board said vessel as second pilot; the vessel ran on shore near Trepassey, Newfoundland, on the 23rd December, 1857, at about two o'clock, p. m.; strong S S W. winds, and heavy seas; vessel struck first on the bows, and afterwards veering round to the west, still aground; soon after we got aground, saw many people on the beach, and we threw a rope to them, which was made fast ashore, and then the captain and all the crew left the vessel and went ashore by the rope; I knew nobody on shore, but soon after landing a person arrived who from his dress and appearance I thought was somebody of rank; I saw Mr. Geo. Simms for the first time on shore, but did not then know who he was; I saw also George Simms, jr., and John Simms, his son, but without knowing who they were at that time; I do not remember which of them I first saw; the captain, Maristany, addressed himself to Mr. George Simms by signs, not knowing the English language; I did not see the captain address himself to any one of the sons; the captain intimated to Mr. George Simms by signs that he had specie on board, and then I understood that the said Simms answered words which struck me as being "bye-and-bye"; there was money on board the *Plata* at the time of the wreck in Mexican doubloons, and was deposited in the cabin of the captain; I do not know the precise amount, but believe it to be from nine thousand nine hundred to ten thousand dollars, as I saw it counted in the house of Mr. George Simms at Trepassey, and was present and assisted in the embarkation of this money on board the *Plata* at the Havana, and the captain himself told me that he had that sum on board; the captain and crew went to Mr. George Simms's house about ten minutes after landing, being invited to do so by him; he accompanied the party a short way, and there placed the party in the care of his wife who had come

out to meet them; Captain Maristany and the crew of the *Plata* remained at Mr. Simms's dwelling only a sufficient time to dress themselves, having come ashore naked; while dressing ourselves George Simms, sr., George Simms, jr., James Simms and John Simms were on the beach; the captain, the mate and myself returned from Mr. George Simms's house to the place where the vessel was; we went on board, entered the cabin, and collected the money, and we saw on board several persons, some on deck and four or five in the cabin; I saw that the writing desk of the captain had been broken open by some one; on leaving the cabin I met two of the sons of Mr. George Simms standing on the deck; the money was found in the same place in the cabin where it was at the time of the wreck; the captain, mate and myself were present with four or five other persons not belonging to the crew; but only the captain took possession of the money, the same being placed in a canvas bag and carried on shore by the mate.

I have already explained where the money was found and how removed from the vessel to the shore by the captain and mate; two of the Simms were on board with other persons when we left the vessel and were on deck near the cabin; when we got on shore we laid the sack containing the money on the sand and covered it with a jacket, on which a still younger son of Mr. George Simms, supposed to be about twelve years of age, sat down on the sack; I did not hear the captain or Mr. George Simms address each other; a short time after the money was on shore, the mate and myself carried it to the house of Mr. George Simms, where we left it on a chair, and on the captain, who had remained behind on the beach, coming to the house he was told there was his money; I do not recollect any other particulars attending the finding of the money on board or the carrying of it to Mr. George Simms's house; one of the Simms asked the mate by signs where the money was, to which the mate intimated by signs that the money was on shore; after dining at Mr. Simms's house, the captain requested Mr. George Simms to count and take charge of the money in the presence of myself, the mate, and, I believe, all the Simms's family; the money was counted on the dinner table by Mr. George Simms and all his family; I do not remember the exact amount, although I believe it was from nine thousand nine hundred to ten thousand dollars; the captain requested Mr. George Simms to take charge of the money

until it could be removed, when Mr. Simms made a packet of it, securing it with red tape, and sealing it with two seals, one to each end of the tape, giving the captain one of the two seals and keeping the other himself; the captain and crew remained at Trepassey in the House of Mr. Simms, who invited them to do so for twelve or fourteen days, at the invitation of Mr. Geo. Simms; the captain did not go away by influence of any one, but remained until he could collect all that was possible from the wreck, and she was further detained by the weather: Mr. George Simms took charge of the vessel and all the materials, he having offered to do so, and to employ men for the protection of the property; I do not know why the captain and crew were not so employed.

Mr. Simms produced some apparently official paper with the English Royal Seal to show that he was a person of authority, in the presence of the captain, mate, and myself. I did not see Mr. Simms present any account to the captain, though the captain told me afterwards he had done so. I believe the money was counted again. I do not know how often. The captain went into a room with Mr. George Simms to settle accounts with him, and on the captain leaving the room he told me and the mate that Mr. George Simms had retained eighty doubloons, a portion as payment of expenses incurred in saving property of the wreck, and the remainder on account of a commission of five per cent. charged by Mr. George Simms. The money was carried from Trepassey to St. John's with the captain's consent, by two of Mr. George Simms' sons and two men engaged for the purpose. I know of no objection on the part of the captain nor of any desire or arrangement of the captain respecting the bringing of the money. I believe the amount of money carried to St. John's was the same that had been saved and deposited at Mr. George Simms's, of course deducting the eighty doubloons retained by Mr. Simms as previously explained. Some wearing apparel and cabin furniture and the chronometer were taken to Mr. George Simms' house. The wearing apparel and chronometer were returned to the captain and crew, but not so, some tobacco and silver spoons which were detained by Mr. George Simms, notwithstanding the captain having expressed his wish to take the tobacco to the Spanish Consul at St. John's. I do not know the exact day upon which the captain left Trepassey for St. John's, though I presume it must have been from the 7th to 9th January, 1858. He left in company with me,

Mr. George Simms, jr, Mr. John Simms, and two other men. We were from four to five days on the journey and nothing particular occurred during it. I think that the vessel, and of course all that she contained, might have been saved with proper diligence and care. The vessel was improperly cut up by persons belonging to the shore, and the pieces were illegally carried away. After our arrival at St. John's the money was taken to the hotel by the two Simms's and ourselves, and it was the wish of the captain to take the money in the next day to the Spanish Consul at St. John's, but that afternoon the two Simms's lodged the money in the bank at St. John's without our knowledge and I believe without the captain's consent. The Simms's did not save the money from the wreck, which was saved by the captain, mate, and myself, and carried on shore by ourselves as before stated. All the Simms's board in the house of Mr. George Simms, as to their communications about the wreck I cannot state anything, not being acquainted with the English language. No distinct query being put to me, I am unable to state anything further than I have already related.

Cross interrogatories put to Joses Erout.

I neither understand nor speak English. The captain and crew of the *Plata* were lodged and fed in the house of George Simms the elder while in Trepassey. Some clothing was in the first instance, lent us to cover our nakedness on landing, but on subsequently recovering our own clothes, the wet ones were returned with the exception of some shoes and stockings. No men were employed to protect the specie either in taking it from the vessel or in conveying it to Mr. George Simms's house. Mr. George Simms and his two sons did not go on board the *Plata* with us where the money was saved. The captain was not urged by anybody to save the specie but did so of his own accord. Many persons were at work, but I am not aware that they were employed to do so by Mr. George Simms, a large quantity of the saved materials were put by him into store. A vessel was hired by Mr. George Simms to carry the crew and part of the materials to St. John's, a much greater proportion of the materials, however, were not shipped. We remained some two or three weeks at St. John's, I went along with the captain to St. John's and when we got there the mate and crew presented themselves, having arrived before us; I know of no arrangement made by the captain for our return to Spain. No direct question being put to me I remember nothing further than I have already stated.

Pedro Ovens being at the present time absent from Spain, the Commission was unable to take his evidence.

Mr. J. Nugent, Secretary to the Consul of Spain, deposed to having demanded money from plaintiffs; he refused when offered to take it after office hours—they came to Consulate and said the money should be brought next morning—Mr Tasker was present; they did not bring the money next morning.

The defence being closed, Mr. Hoyles closed in a speech of great length; after which His Lordship charged the jury as follows:—

Gentlemen of the jury: This is an action brought against Maristany y Elias by George Simms, John Simms, and James Simms, to recover the sum of £356 11s. 8d. as compensation for services in saving a large quantity of specie from the Spanish barque *La Plata*, which stranded on Trepassey in the month of December, 1857. There were two questions for the jury to consider: 1st, Did the plaintiffs render any honest and substantial service to the defendant in the saving of his property? 2nd, If they did, what compensation are they entitled to recover? You have listened with great attention to the evidence as well as to the remarks of the learned counsel on both sides; and in a case of importance as this is, to the defendant that the plaintiffs should receive at your hands no more than they righteously deserve for their services; and to the plaintiffs that they should obtain fair compensation for meritorious services (if they rendered any) on behalf of the defendant, you will, I am sure, look upon the case with a view to administer equal justice to both the litigants; the defendant being a foreigner, will not in a British court of justice, where the rights of all parties are equally protected, for a moment prejudice his defence. Every suitor, no matter who he be, will receive from this Court, and I am sure from you as a British jury, the same consideration whether he be a foreigner or a British subject. A great deal of extraneous matter connected with the wreck of the *Plata* has been introduced in evidence, all of which, except that referring specially to the actual claim of the litigants for salvage and meritorious services in the salvation and protection of the specie, you will discard from your minds. Now, as to salvage, it is not confined to mere work and labor—other more important ingredients are necessary to constitute a salvage claim. There must be taken into consideration the enterprise of the salvors and the risk to their lives in saving lives and

property; next the degree of danger the lives or property of those saved were in, whether in imminent peril or otherwise; and further, the extent of labour, skill and time exercised or occupied in the salvage services; and lastly, the value of the property saved. The law gives juries a wide scope in estimating the value of salvage services from one-half to one-tenth, more or less according to the facts of the case. The salvage of bullion on account of its portableness and the facility of saving it, is generally less than the amount given for heavy merchandise. A case somewhat analagous to the present, though differing in some respects from it, I may mention for your information—(Here the learned judge read from 2, *Robinson, Adm. Rep.*, p. 255, on the law of salvage, and referred particularly to the case of the *Favourite* where a person under an agreement with the master of a stranded vessel had taken charge of the ship, and had succeeded in saving and warehousing a portion of the cargo, the vessel having gone to pieces, held entitled to a salvage remuneration although his services were to be considered in the character of a meritorious agency rather than of salvage services.) I have no reason to distrust the honesty of the people of Trepassay, but in all localities it must be borne in mind there are some who are not particularly mindful of the observance of law in cases of wrecks. I will now, gentlemen of the jury, proceed to read the evidence on the part of the plaintiffs and defendant which has been given in this cause. (His Lordship here read through the evidence.) I must tell you as a matter of law, and you should be satisfied that salvage services have been rendered by the plaintiff and others, that every salvor is entitled to his own salvage. Reference has been made throughout the case to the acts of the father of the plaintiffs. If you think the father and sons were combined and participate in what either has or may receive, you will charge against the plaintiffs the acts and receipts of the father in respect of the wreck and specie. But it appears there is an action pending by the present defendant which will test the merits of his conduct in reference to his connection with the *Plata*, her captain and the specie. By the account of Mr. G. Simms, sr., it appears the salvage services are specially mentioned as not settled; this account it appears by evidence was assented to by the captain, who according to the evidence of the plaintiffs and of the mate, though he did not understand English, comprehended some of the charges in the account.

Now, by the evidence of the plaintiffs and their witnesses, the vessel it appears was after her stranding on the beach, logged and virtually abandoned by her captain and crew. And it is said that through the skill and prudence displayed by the plaintiffs in concealing the specie from the knowledge of the people, and assisting to get it on shore to a place of safety, and their subsequent exertions in conveying it to St John's through a long tract of country, all this large amount of money was saved. The evidence for the defence asserts that the defendant and his crew saved the specie, and that the plaintiffs have only a small claim in justice to any compensation. The jury must discriminate between meritorious salvage services and mere work and labour on the one hand and plunder on the other; and I tell you, gentlemen, that anything like plunder or foul play on shipwrecked mariners will be met with a strong hand by the Court; and where claims for salvage are put forward they must be sustained by proofs of the strictest honesty and good faith on the part of the alleged salvors. In this case it is for you to say whether the conduct of the plaintiffs was dishonest or not; they say that they acted with perfect good faith, and that when the ship was exposed to plunder, they, by their prudent conduct, saved the \$10,000 in gold then on board.

The defendant on the other hand contended that been obliged to beach the vessel from stress of weather, the doubloons were saved by himself and crew without the intervention of the Simms. (His Lordship here read the evidence for the defence.) The question that arises for your consideration, gentlemen of the jury, is, was the service of saving and securing the specie performed by the captain and crew of the Spanish vessel alone, or by them in conjunction with the plaintiffs. If you believe that honest services were performed, you will award a fair and liberal compensation to the plaintiffs; but if on the other hand, you are convinced that foul play or unworthy conduct was used towards the Spanish captain, you must and ought by your verdict to reject any imposition or fraud attempted to be practised upon unfortunate shipwrecked mariners.

The jury having retired.

Mr. Pinsent took exception to the charges on the ground that the distinction between work and labour and salvage was not sufficiently explained to the jury—and that the question of George Simms, senior, having contracted with the plaintiffs was not put to the jury, and that the jury should have been

directed to consider the accounts of George Simms, senior, of charges on the same property.

The jury not having agreed, were called into Court at 10 p m., and one of them said that it was his opinion that the plaintiffs were only entitled to be paid for their work and labour, while the rest were for giving them salvage, and that they therefore could not agree on the amount.

The Court directed them that so long as they were agreed that the plaintiffs were entitled to something, it was immaterial whether they called it work and labour or salvage, but as to the amount, the Court could not direct them.

Mr. Pinsent, after the jury had retired, excepted to this direction as calculated to mislead on a matter of principle.

The jury not having agreed by eleven o'clock, were locked up until to-morrow morning, when they returned a verdict for the plaintiffs for £266 currency.

On a subsequent day the following judgment was delivered on motion for a new trial:—

After giving the fullest consideration to the circumstances disclosed by the evidence in this case, we are of opinion that the verdict should be set aside on the ground of excessive damages, and that the plaintiffs' claim should be submitted to a further investigation, on the simple question of how much the plaintiff's services were worth, irrespective of anything received by their father, for his charges. Let a new trial therefore be granted on the payment of the costs of the previous trial.

Mr. Hoyles, Q. C., and Mr. Carter, Q. C., for plaintiff.

Mr. Pinsent for defendants.

1859, *January*. HON. P. F. LITTLE, (acting) C. J.*Practice—New trial—Setting aside verdict.*

In an action for taking and detaining certain monies to the value of £370 from the plaintiff, the defence pleaded was set-off for certain charges in and upon and concerning the recovery, custody and care of said monies which had been salvaged by third parties from a wrecked ship. The jury found for the plaintiff for £45 currency. On a rule for a new trial the Court refused to disturb the verdict of the jury, notwithstanding that the amount of the verdict was less than the disbursements, which the plaintiffs alleged he had paid away on behalf of the defendant.

THIS was an action brought to recover the value of eighty doubloons, alleged to have been taken and detained by the defendant out of a sum of ten thousand dollars saved from the wreck of the Spanish vessel *Plata*. The plaintiff's case was proved by the same evidence which has been already reported in the case tried in the Central Circuit Court, in which George Simms, jr., John Simms, and James Simms, were plaintiffs, and Maristany y Elias, defendants. Mr. Pinsent having opened the case to the jury, and given a general relation of the circumstances, leaving it to the defendant to justify the appropriation of the money, had the evidence above-mentioned read. Mr. Hoyles addressed the jury for the defence, and brought the evidence given below in proof of the set-off filed by the defendant, and which was as follows:—

*Captain Marristany y Elias,**To George Simms.*

1857.

Paid 6 men each £10 to protect and assist my sons recovering specie from wreck	...	...	£60	0	0
Paid labor of men securing and carrying from wreck master and mens' clothing and property, sails, rigging, &c., horse and cart hire, and for watch at night and shipping materials on board <i>Mariner</i>	...	...	10	0	0
Salvage on various articles saved from wreck	...	...	17	3	0
Boarding and lodging Capt Marristany and two mates in my family at 30s per week, and nine seamen at 20s. two weeks each	...	...	27	18	0
Sundry articles supplied Captain	...	...	3	16	6

My commission and agency on specie saved to include care, custody and management (exclusive of any claim for salvage and exclusive also of my sons' claims for salvage services ...	£123	17	6
Paid guides to Ferryland	5	0	0
Paid Telegraph messages	2	11	6
Commission on charter of schooner <i>Mariner</i> to convey materials and seamen to St. John's, £50, at 5 per cent.	2	10	8
Do. on materials received from salvors shipped to St. John's, value £220, at 5 per cent. ...	11	0	0
Storage of ditto at Trepassey	5	10	0
Amount advanced to George, John, and James Simms to defray travelling expenses of salvors to, in, and from St. John's with specie overland, and captain and mate's expenses, and in part payment of their claims for salvage (leaving settlement of their own claims to be made at St John's)	48	0	0
Paid salvage on shirt buttons	0	12	0
	<hr/> £317 18 6 <hr/>		

CR.

Net proceeds of sale of wreck of brig <i>Plata</i> ...	£13	19	6
Amount received from Captain Maristany (doubloons at \$16)	229	17	6
Balance due George Simms	4	11	6
	<hr/> £317 18 6 <hr/>		

George Simms, jr., son of defendant, deposed to *Plata* going on shore at Trepassey on 22nd December, 1857,—saw her coming in under heavy sea, wind S.S.W.; she was running towards the back of the beach where there was no shelter with that wind; when she stranded the crew left her by means of a rope which was thrown to them from the land, the sea running very high at the time. The captain and crew went up to father's house, where they obtained refreshment. (Here the witness entered into particulars as to the saving of about £3,000 in doubloons by witness and his brothers from the *La Plata*, then depositing it in the hands of their father, defendant, for safe

keeping; then bringing it on their backs to St. John's, and depositing it in the Union Bank, with other details, all of which appeared in the reports of *Simms et al vs. Y. Elias*. Vide *Newfoundlander*, June 6.) The account produced was shewn to the captain, he understood it and assented to it; it was explained to him, he could not speak English, but brother knew a little Spanish, and by aid of a Spanish dictionary and signs everything was clearly explained to him and he was satisfied.

Cross-examined,—Our claim is £359 11s. 8d., for salvage services; father and brothers live together in same house; account produced is in my hand-writing. Don't speak Spanish myself, but we could make captain understand by signs; my father is justice of the peace but does not always act in that capacity in case of wrecks; he is always chief clerk and registrar of the Southern Court. Father took 75 doubloons out of the bag for salvage and expenses with captain's assent; father not stipendiary; only honorary magistrate; monies charged as paid in the account were paid to different parties for saving things from wreck, for guides to Ferryland, and for other expenses. (Witness was cross-examined and re-examined at length, but his evidence differed but little from that given in the trial referred to above.)

The written examination of John Curtis and Wm. Devereux was then put in and read:—

John Curtis, sworn,—Witness lives in Trepassey; was there in 1857 when the *La Plata* went on shore; witness saw her go ashore at 11 or 12, noon; weather very bad, wind strong S.S.W.; went on shore on the beach back of Trepassey, heavy sea. Give an account of the wreck and what became of her. Answer—the crew abandoned the vessel; the vessel remained there in the same state as before; she did not stand more than an hour before she was hogged, the copper beaten off by the sea since people from the shore boarded her; can't tell what they did; saw Mr. George Simms, the defendant; came there an hour after the vessel went on shore; he sent witness, his son, and four others on board; there was difficulty and danger in getting on board; does not say there was danger, witness was not as smart as others; if the sea came up whilst getting on board, likely to be carried away; witness understood he was sent on board to protect what was there; did not know of any money being on board; for witness's part he did not do a great deal; went into cabin, saw the others there and the captain; witness carried out the captain's bed and bedding by his orders; wit-

ness and the others saved all they could save; the masts were cut away; nothing could be saved without cutting the masts away; she was rolling on the beach, the sea making a passage over her; all hands on shore assisted in saving rigging, &c.; of the materials saved two parts were made—the captain had one part and the salvors had the other; witness only saw defendant there once, when he sold the vessel and once before; the captain had his choice of each lot; it was divided by the captain, defendant and the salvors; all was saved in one day from the time she came on shore—from that until night nearly all was saved; the captain and crew stayed at defendant's whilst at Trepassey; the vessel was sold the evening following; can't say if the captain were present; to the best of witness's knowledge he was; there was a vessel hired to send on the things saved to St. John's; two or three days after the captain and the young Mr. Simms left for St. John's; witness and Patrick Tracy went with them as pilots; we received fifty shillings each; we went as far as Ferryland and returned; the first day the vessel went on shore the offer side was beaten in, the copper beaten off; there was ten feet of sand inside and outside of her; next morning there was no ceiling in her; witness received something short of ten pounds for going on board; by defendant's directions it was in foreign coin; don't know exact value; witness received about four or five shillings in money salvage from amongst salvors; witness never saw defendant's sons cutting the vessel or meddling with her in any way.

Cross-examined.—About four hours after vessel struck witness went on board; the captain was on board; was not on board before defendant told him to go on board. Did not see any money on board; saw none landed; saw a bundle thrown from the vessel to the defendant on the beach; can't say what was in it. Witness remained on board between four and five hours; did not see the captain about her all that time, or not more than ten minutes; witness made an agreement with defendant before going on board to receive ten pounds.

Re-examined.—Was not on beach when vessel struck; was almost a quarter of a mile off at the time, walking towards beach; almost an hour after she struck, defendant came there. There was no possibility of saving the vessel. When witness went on board, Mr. George Simms, jr., John Simms, and James Simms went on board—they were before witness, only one at a time could go on board; there was only one rope to get on

board by—there were plenty hands on board before that; did not see the young Mr. Simms's on board before that time.

JOHN ^{his} X CURTIS.
mark.

Taken before me, being }
read over, }

THOMAS J. KEOUGH,
Examiner.

William Devereux, sworn.—Witness resides in Trepassey; recollects the *La Plata* going on shore in December, 1857, she was smashed up there, there was no possibility of saving the vessel to the best of witness's knowledge. The defendant took charge of the wreck; there was a number of men employed in saving her materials; the salvors got one half; witness bought the vessel, she was sold the evening she went on shore or the next day; the captain was there; he was present when the materials and things were divided; witness did not go on board until he bought her; then there was a hole in her bottom; there was a great deal of sand in her; when witness was going to meet captain and crew, does not think they stopped five minutes after getting on shore; there was a vessel chartered to send on the things to St. John's; the weather was very bad when vessel went ashore, heavy sea and blowing very hard; the only sail the vessel had up was her jib running in before the wind; never saw defendant's sons cutting the vessel or doing her damage in any way; could not but have seen them if they had done so; saw the captain and Mr. and Mrs Simms go into the hole in the bottom of the vessel broken by the sea the night she went on shore and after. No cross-examination.

WILLIAM ^{his} X DEVEREUX.
mark.

Taken before me, having been }
read, 13th May, 1859. }

THOMAS J. KEOUGH,
Examiner.

George Simms, defendant, was called and deposed to all the facts connected with the wreck, saving of the doubloons, and other particulars. When money deposited in his house, captain and I counted it and sealed it. I communicated to the consignee at request of captain of loss of vessel. When I heard that specie was on board I selected six trusty men promising

them £10 each to assist my sons and myself to save the money for the captain. Captain and consignee both appointed me as agent to realise the vessel and her cargo and to take off the wrecked property. All the expenses of the vessel were paid by me; all the items in the account except the five per cent. commission were actually paid by me for service performed in and about the wreck, &c. The five per cent. is under what I ought to have had, taking into consideration the risk and labor I had. All the charges made in the account are *bona fide* and the usual ones. Were it not for me captain would never have saved a dollar. I got five per cent. on £5,000 from the *New York Packet*, and had no trouble about it. Account produced was shewn to the captain, he was pleased and satisfied with it, and appeared very grateful for what I had done; he distinctly understood the account.

Cross-examined.—Sons claim salvage for £358; am not partner with sons, they live with me; there's a chain and anchor still on the beach, and other small articles in my possession ready to be delivered when applied for. The persons I paid £10 each to are not in debt to me or my sons. I sent my sons on to St. John's with specie; don't speak Spanish, but by aid of dictionary and signs, and the little Spanish my son Augustus knew, we made the account and all other papers perfectly intelligible to captain. *New York Packet* came from New York; I had the money saved from her in my possession all the winter. I ought to have had more in that case than five per cent.; the matter was referred to arbitrators, who awarded five per cent. My sons don't act under my directions, they are on their own account, and in business for themselves. I asked the *New York Packet* 12 per cent. The ten pounds a piece to the six men was given to them simply to remain while my sons and the captain were getting the money. Their services ended as soon as the mate handed the sack on shore. I do commission business in this way although a magistrate.

Kenneth McLea was arbitrator in the matter of commission for money saved from *New York Packet*—he gave five per cent.

Alfred Simms sat on the money on the beach when it was landed from the vessel; father told me to do so; I am 12 years old

Augustus Simms understands a little Spanish, and by aid of dictionary and signs, everything was made clear to captain.

The defence having closed,

Mr. Pinsent closed to the jury, when his lordship acting Chief Justice Little, charged the jury as follows :

Gentlemen of the jury,—This action is taken by Marriстанy y Elias against George Simms, to recover the value of eighty doubloons, equal to about £320, which plaintiff alleges defendant took from him and improperly appropriated and unjustly detained. The circumstances of the claim arise as you have heard from the evidence out of the wreck of the Spanish ship *La Plata*, which became a total wreck upon the coast of Tre-passey in the month of December, 1857, and from which a large sum of money, equal to £3,000, in doubloons had been saved. You have heard the evidence on both sides as to the manner in which this specie was saved, and it was for you to judge whether the defendant and his sons were, as they allege, mainly instrumental in saving this money, or whether, as alleged by plaintiff, he and his mate brought it from the wreck. The plaintiff, on the one hand, is a Spanish gentleman, who is here seeking for his rights; the defendant, a Justice of the Peace and Chief Clerk and Registrar of the Southern Circuit Court; and you will, gentlemen, give this case your fullest and fairest consideration irrespective of the fact of the one party being a foreigner and the other a resident here; do to both parties the fullest measure of justice, for to all litigants, no matter who they may be, a British Court and a British jury will afford equal justice and equal protection. The plaintiff says the defendant took from him some eighty doubloons, which he has unfairly appropriated and unlawfully withheld. The defendant answers this charge by a set off account, which is here before you and by which, in accounting for the sum, he brings the plaintiff in debt to him to the extent of £4 11s. 6. Now, gentlemen, with reference to the items of actual payments and charges, extra the charge for commission, if you believe they were necessarily and *bona fide* incurred and paid in all honesty and good faith, the defendant ought to be allowed to set-off so much so paid against the amount of doubloons received by him. The evidence referring to those different items I will now read to you. (Here His Lordship read at length all the evidence, commenting upon portions of it as he proceeded). But the chief item of contention here is the charge of five per cent. for commission, care and custody of amounting to £123 17s. 6d., excluding salvage claimed by defendant's sons. The first question you will ask yourselves is, what number of doubloons was taken by defen-

dant—was it 70, 75, 80? and the next, have all these been duly accounted for? if so, you will find a verdict for defendant. With reference to the last question, the chief item I apprehend you will have to deal with is the one I allude to for commission. If under all the surrounding circumstances of this case you believe this to be a fair, reasonable and honest charge, you will allow it; but if you consider it to be an overcharge, you will reduce the amount charged by so much as you may think fair. I will further observe that if you believe the defendant was connected with his sons in the salvage profits referred to and participated in them, and that the commission on that account should be disallowed or reduced, you will disallow or reduce the charge to such a sum as you may deem fair.

The jury retired at half-past 8, and, not having agreed at 11 p. m., were locked up for the night.

Upon the following morning they returned a verdict for the plaintiff for £45 currency.

On a subsequent day the following judgment was delivered on a motion for a new trial:

In this case we are of opinion that there is no objection tenable to the evidence admitted on the trial, and that the defendant has no reason to be dissatisfied with the verdict. We, therefore, discharge the rule for new trial.

Hon. Mr. Pincent for plaintiff.

Mr. Hoyles, Q. C., and Mr. Carter for defendant.

1859, *January*. HON. MR. JUSTICE ROBINSON.

Practice—Attachment—Property attached in custodia legis—Levy under a fi. fa.

Where the property attached, and upon which the sheriff was directed to levy, under a *fi. fa.* was in *custodia legis* it having been delivered up by the sheriff to the plaintiff, and subsequently attached at the suit of a third party, under which attachment it was held. Upon a rule upon the sheriff to shew cause why he should not levy execution under the *fi. fa.*, and why the property attached should not be applied in satisfaction of the judgment,

Held—The rule must be discharged.

ON the 10th June the plaintiff had become a judgment creditor, and immediately issued a *fi. fa.* upon the judgment, sealed and entered in the record book of the clerk's office, the writ was then taken to Mr. Kough, the Acting Chief Clerk, for signature; Mr. Kough refused to sign the execution, as there was a motion by a creditor pending before the court for the appointment of a provisional trustee, the defendant having petitioned to be declared insolvent. In the course of several minutes, stated to be from fifteen to twenty, the court appointed Mr. Kough such trustee; he then signed the execution, which was taken to the sheriff, who, before such signature, was notified by Mr. Kough of the appointment; the sheriff accordingly refused to act upon the execution, upon the ground that all property of defendant had passed to the trustee. The action had commenced by attachment, issued on the 28th May and returned on the 30th with the following return: "I have attached the within-named John W. Jackson, by his goods and chattels, viz., a quantity of American clocks, to the value of twenty-six pounds five shillings sterling, to abide the judgment, decree or order of the court in this action." "John V. Nugent." The direction on the *fi. fa.* was "levy on the property attached." The petition to be declared insolvent was not sworn to or filed until June 10th, and the proceedings under the 19th Vic., cap. 14.

The plaintiff's attorney obtained a rule on the sheriff to shew cause why he should not levy execution under the writ of *fi. fa.*, and why the property attached should not be applied in satisfaction of the judgment.

It was contended in answer to this rule that the property had passed to the trustee before the signing of the *fi. fa.* and its delivery to the sheriff; there was also an affidavit of the sheriff's bailiff that the property attached under the attach-

ment in this cause had been released by the defendant giving security, and that it had been attached at the suit of another creditor, who had not yet obtained a judgment, and that it was therefore in *custodia legis* and could not be levied upon. For the judgment creditor it was contended: that but for the improper refusal of Mr. Kough to sign the writ of execution it would have been in the hands of the sheriff before the appointment of trustee; secondly, that in any case it bound the property from its *teste*; thirdly, that under the 19th Vic., cap. 14, there is no power to appoint a trustee, there must be a statutable provision; fourthly, that there was no sufficient notice to the sheriff, and no rule of court or vesting order either made or served; fifthly, that if the Judicature Act were held to empower the appointment of a trustee, that under that statute such trustee should be a creditor.

Mr. Justice Robinson delivered the following judgment:— Without determining any of the other points raised in the argument, some of which involve questions of some nicety and importance, I am of opinion that the summons on the sheriff must be discharged, as it appears by the affidavit of Mr. Jeans that the property which was attached in this cause, and one which the sheriff was directed to levy under a *fi. fa.*, was and still is in the custody of the law, it having been delivered up by the sheriff to the plaintiff and subsequently attached at the suit of one Haly, under which attachment it was held by the sheriff when he received the execution in this cause; but the rule is discharged with costs.

1859, *January*. BY THE COURT.

Practice—Non-suit—Power of Court to compel non-suit—Rule nisi to set aside non-suit.

In an action of trover the defendant moved at the close of defendant's case for a non-suit on several grounds. The plaintiff refused to be non-suited, contending that on his own election only could he be non-suited. The Court non-suited him. On a rule nisi to set aside non-suit, and for a new trial,

Held—That as there was no court of error from which a bill of exceptions lay from the Supreme Court, that its constitution was therefore such as to give it the power of peremptory non-suit.

THERE was a rule *nisi* obtained by the plaintiff in this cause for setting aside the non-suit and for a new trial. The case was one of trover, damages laid at £1500, and had been tried in the spring term of this court. It was brought to recover the value of the hull and materials of a vessel lost at Cape Race in the preceding summer, sold at auction by the master, one Benson; terms of sale being cash, or an approved note on St. John's; the property to be at the risk of the purchaser; the plaintiff became the purchaser for £161. After the sale it was agreed between the master and the plaintiff that the mate and the plaintiff should proceed on to St. John's, where the former was to provide the money and pay it to the mate there, or give him an approved note payable on the arrival of the materials in St. John's. Plaintiff and mate left by land for St. John's; the plaintiff, from fatigues, did not arrive until two days after the mate, when he found that the mate had left St. John's; that Benson had come on by water and hired a vessel, and had returned to Cape Race. In a few days Benson returned, bringing the materials sold as aforesaid, and deposited them with his agents, the defendants. The plaintiff thereupon demanded his property from Benson and from the defendants, and tendered the purchase money in a bag; no exception had been taken to the quality or the quantity of the tender, but the money was refused, the defendants saying that the plaintiff had not kept his contract.

The master immediately after the sale had taken the plaintiff on board and delivered him possession; had advised him as to the course to be pursued by him to save the hull and materials; had recommended some of his own men for hire; had sold him provisions subsequently to the sale; had declared to several of the witnesses that the property was now the plaintiff's, &c. The plaintiff took possession of the purchased property accord-

ingly; put hired men in charge to strip, &c, and took an absolute bill of sale from the captain, which he (the plaintiff) lost on his way to St. John's, but proved the contents. When Benson went to Cape Race in the hired vessel and attempted to take the materials, he was at first refused by the plaintiff's men, but he told them that he would settle with the plaintiff in St. John's. Evidence was also given of the value of the materials alone being from £500 to £800.

Mr. Robinson moved for and obtained a non-suit on the three following grounds: that the sale was a conditional one; that being a conditional one, there was no legal tender; that if the tender was legal, it had not been made in time.

The plaintiff's counsel refused to be non-suit, protesting against the right of the court to compel a non-suit. The court reserved the point. Upon which, at a subsequent day, Mr. Pinsent was heard, and argued that the proceeding of non-suit was in strictness the act of the plaintiff in an action, who feeling a deficiency of proof elected to be non-suit, and that he might require a verdict of the jury if he pleased; that contrary to the express dissent of the plaintiff, the court could not direct him to be non-suit; the form of the judgment was "being solemnly called comes not, nor does he further prosecute," and cited from English authorities, viz., *Archbold's Practice*, 433, *et seq.*; *Minchin v. Clement*, 4 B. & Ad., 253; *Dewar v. Purday*, 4 N. & M., 643; *Ward v. Mason*, 9 Price, 291; 13 Price, 224; *Kindred v. Bagg*, 1 Tauton, 10; *Alexander v. Barker*, 2 C. & J., 153; *Law v. Wilkins*, 1 N. & P., 697; *Elworthy v. Bird*, McLell, 69.

The court held that as there was no court of error to which a bill of exceptions lay from the Supreme Court, that its constitution was therefore such as to give it the power of peremptory non-suit.

The question then of the sufficiency of Mr. Robinson's grounds for obtaining the non-suit remained for argument, and were supported by him to-day. The plaintiff was a passenger, bound on the telegraph line to his labor without means. The vessel had been put up for sale, and the result was that the plaintiff was the highest bidder. The terms of the auction sale had not been observed, and the days limited for return from St. John's with the accepted note had passed. The sale had been a conditional one, and if so, the defendants were not precluded from rescuing the property from the plaintiff in case of breach of contract, irrespective of the contradictory evidence as to possession; *Blox-*

am v. Saunders, 4 B. & C., 941; *Bishop v. Shilto*, 2 B. & Ald., 326; *Roscol*, 506; 2 *Starkie*, 887; *Noble v. Adams*, 7; *Taunt*, 59.

Mr Pinsent contra reviewed the evidence and facts as above; so far as any time being limited for the return of the plaintiff, that was not part of his case; one witness had said that the mate was to be back in three or four days, or was expected back. The evidence of delivery of possession and of actual possession was superabundant, had been supported by the testimony of a great number of witnesses, the question of credibility was one for the jury and not for the court. The passing of a bill of sale, and proper proof of its contents, and of the manner of its loss had been given, this was alone and unsupported sufficient to go to the jury. It was a common case of goods sold and delivered, and the defendants should have relied upon their remedy for breach of contract, if there was any such breach. But there was no such breach! Supposing the sale to have been conditional, the tender was made as soon as by the laches of the vendor the plaintiff could effect it; if it were not in time, so long as it was made at all while the possession remained in the vendor or his agents it was sufficient; the tender was formed and satisfied as to certain accounts of shipments to New York; and as to a mortgage given legal, as no exception had been taken to the quality, but it was refused on other grounds, and cited *Harman v. Anderson*, 2 Camp, 243; *Storeld v. Hughes*, 14 E., 308; as to time of tender—*Martindale v. Smith*, 1, 2 B., 369; 1 *Campbell*, 410, note; *Gillard v. Brittain*, 8 M. & A., 575; and as to quality and sufficiency of tender—*Greenleaf*, *Starkie*, and *Phillips*, under that head.

By the Court—If the jury had found a verdict for the plaintiff, it would have been unsupported by law. We are clearly of opinion that the rule for setting aside the non-suit should be discharged.

Mr. Pinsent and *Mr. A. Emerson* for plaintiff.

Mr. Hoyles, *Q. C.*, and *Mr. Robinson*, *Q. C.*, for defendants.

1859, *January*. HON. MR. JUSTICE ROBINSON.

Practice—Specific performance—Vendor and purchaser—Assignment of leasehold interest.

The agreement sought to be specifically performed must be accurately stated on the record, and the case proved as stated. A Court of Equity in the exercise of an enlarged discretion may decree or refuse to decree specific performance of a contract, but it possesses no power to make one, or to add to the terms and conditions of that made.

THE matters at issue in this case are trifling, and I should have been glad if I could have made such an order therein as would have terminated litigation between parties to whom it cannot fail of being burthensome, but I feel I have no other alternative than to dismiss the bill. The suit is brought to obtain specific performance of an agreement. It is a well recognized principle of law that the agreement sought to be specifically performed must be accurately stated on the record, and the case proved as stated.—*Ormons v. Anderson*, 2 B. & B., 369; *Savage v. Carroll*, 2 B. & B., 451. A Court of Equity in the exercise of an enlarged discretion may decree or refuse to decree specific performance of a contract made by the parties, but it possesses no power to make one for them, or to add to the terms or conditions of that made.—*Newell v. Hussey*, 2 B. and B., 288. Even when by the answer an agreement is admitted, but different from that set up by the bill, the bill has been dismissed.—*Seyh v. Mansfield*, 5 Ves., 452; *Pilley v. Armidge*, 12 Ves., 78.

It does not seem very easy even to surmise what was the actual agreement between the parties in this case, of which the court is asked nevertheless to decree a specific performance. Mr. Whiteway, the learned counsel for the complainants, alleges that the agreement was, that on the 1st May, 1855, the defendant was to deliver up to the complainant the possession of the house and land in question, together with a valid lease to him from the head landlord, a clear title and all ground rent paid, adding that the only question was respecting the ground rent due 1st May, 1855. Fanny Bridgman, one of the complainants, however, expressly deposes in her evidence that the parties came to no definite agreement as to the ground rent that the real agreement was, that in consideration of £30 the defendant agreed to assign all her right, title and interest, on the 1st May, 1855, in a piece of land for which he held a memorandum of a lease for thirty years for Mr. Gill; that £17 was

paid on account, and the balance was to be paid when defendant could procure a lease from Mr. Gill. She speaks nothing of proved rent, whilst Susan Bridgman, the other complainant, deposes that she was present when the agreement was made; that it was not at first concluded because of a difference about the ground rent, but that it was eventually reduced into writing, and is produced (in which I find no mention made either of ground rent or lease). And lastly, the solicitor for the complainant in his evidence deposes that he was instructed in April, 1855, to request of defendant an "assignment of his lease," but says nothing of ground rent.

Now, here are the counsel, the solicitor, and both the complainants differing as to their agreement, but requiring the court to decree specific performance of what they are themselves unable to define; and if I reject all evidence of the agreement except that which is in writing, I find it is void under the statute of frauds, for want of the price being mentioned therein.—*Blagden v. Bradshaw*, 12 Ves., 466. The complainants labor under a further defect in their case, in that they have not tendered to defendant at any time the balance of purchase money, or submitted to him for his execution a conveyance of his interest, which I think they ought to have done, for after he had given them one agreement in writing, which one of them designates in her evidence as "the agreement by which defendant transferred his interest," it was incumbent on the vendees to have tendered any further conveyance they might have desired, and that without reference to the general rule as to the duty of the vendee to tender conveyance. I may state that without deciding whether it would be competent for the plaintiff to vary by parol or otherwise a written agreement which they set out in their bill, and declare to be the definite one between the parties, the evidence is wholly insufficient to satisfy my mind that the possession by the defendant of a formal lease for Gill, which the complainants insisted upon, was a preliminary condition to the completion of the sale. A transfer of the memoranda for a lease ending — , 1855, would have conveyed a substantial right to the complainants; it would be consistent with the written evidence, and is declared by the defendant to be what he stipulated for, who also expressly denies any obligation on him to get a lease.

I cannot doubt from the evidence that if after a lease for Mr. Gill had been obtained, this Mr. Simms, the complainant, had tendered to the defendant the balance of the purchase

money, he could have executed a necessary agreement, for it is proved by one of the complainants herself that he professed his willingness to do all he could to comply with his agreement, for he was anxious to leave the country, and said he would give them up the land.

The complainants have failed to make up a case for the relief they seek. The court has no power to make decrees contrary to the allegation and prayers of the bill to the proof in this cause; they have not taken those steps which they ought to have adopted before embarking in an equal suit, and their bill must be dismissed.

I dismiss it, however, without costs; because I think the defendant was somewhat to blame; he admits that he agreed to sell his interest for £30, and to deliver up possession on or about the 1st May, and that there was no agreement as to ground rent. Yet, through his counsel, he states at the argument that he would have delivered up possession if a proportion of ground rent, together with balance of purchase money, had been paid. It is therefore more than likely that he had been raising a question about the ground rent, and creating a difficulty respecting the possession, and have occasioned if not contributed to the act of the complainant in instituting this act. I would add that the offer made by Mr. Little at the argument appears to me to meet the justice of the case, it would have been prudent in the complainants to have accepted it before decree, and I hope it will be made the ground work of a settlement between these parties and thus save the expense of further litigation.

Mr. Whiteway and Mr. Charles Simms for plaintiff.

Mr. Little for defendant.

1859, *January*. HON. SIR F. BRADY, C. J.

Master and servant—Wrongful dismissal—Servant of Telegraph Company, how far bound to secrecy.

In an action for wrongful dismissal by a servant of a Telegraph Company, who is employed under a written agreement containing no obligation in it for secrecy or preventing disclosure of the company's business, it is no defence to set up that the servant disclosed the contents of a telegraph message which went through the company's offices.

This was an action in which the plaintiff sought to recover damages from the defendant for wrongful discharge from the service of the company. The particulars are shewn in the following charge of the Chief Justice:

In this action the plaintiff seeks to recover for wages from the 15th June to 15th September, 1856, at the rate of £50 per annum, and for wages and board and lodging from the last-named time to the 15th January, 1857, at £100. I am thoroughly satisfied that you will forget who the parties are, and give an honest verdict. It appears that the defendants were represented during the period referred to by Mr. Gisborne, Mr. Simpson and Mr. Bird, successively, as superintendents; and the plaintiff alleges that a compact was entered into with Gisborne and Simpson entitling him to recover in the manner above stated; and if you are satisfied upon the evidence of the plaintiff's father and sister he has established a *prima facie* case; they swear to an express contract, against which there are two defences: firstly, that there never was such an agreement; that the testimony of the plaintiff's witnesses is not reliable, and that the testimony of the superintendents contradicts it; secondly, that the plaintiff has no right to look for wages because he disclosed a message. You have heard, as we should have expected, that it was contrary to the rules and practices of the office that the contents of a message should be disclosed either before or after it is sent to the party to whom it was directed by any person in the office of the company, and it ought to be as sacred as a letter in the Post Office, and when it ceases to have that sacred character that Telegraph office will be worthless. We know how mercantile houses might be affected in a case, for instance, where a communication comes relative to the stability of an establishment, and that intended for the information of one party only; therefore, the defendants say that on that ground they had a right to dismiss the plaintiff. I could understand that defence if they said they employed

him—we were under obligations to him, but he has done an act which entitles us to discharge him; but they do not say this. If they employed a man under a written agreement, and no obligation were contained in it for secrecy or to prevent disclosure, they could not set up such a defence; the law obliges them to swear their confidential servants, but not such a one as this. If you act on the suggestion of the court you will throw overboard that ground of defence. As I have stated to you, the plaintiff entered into the office in 1856, and the case sought to be established is, as I have stated; the plaintiff's father says the arrangement was made with Gisborne and Simpson. If you are satisfied with that evidence, give the plaintiff your verdict; but there is much worth your consideration in the evidence given by defendants and in the circumstances under which the plaintiff entered the office. It appears that many persons were disposed, on the first establishment of the company, to enter the office without payment, as you know if a person wishes to obtain a knowledge of any art or profession he is willing to pay for it for his future benefit. But you may not find it very easy in this case to arrive at the conclusion that the party was not entitled to wages. I am not saying this to impress your minds with that idea, but you will probably, on a careful review, feel that you are not satisfied he entered the service with the object of learning without payment. If you believe in the evidence that he is entitled to anything, it is for you to say what it is; if you are not satisfied he is entitled by contract or promise, find for defendant. (Here the evidence of plaintiff's father and sister, and plaintiff's own evidence and that of Gisborne for plaintiff, and the evidence of Simpson, A. Shea and Bird for the defendants, was read, when His Lordship continued) You now have the evidence freshly before you; I have done what I could to enable you to come to a right conclusion. You are not to consider who the parties are—suppose them to be A and B. If you believe the plaintiff entitled to anything, give him your verdict; but if you are not satisfied that he has a right to take money from the company, find for the defendants, or otherwise it would be precisely the same as if you put your hands into their pockets and robbed them.

Verdict for plaintiff at the rate of £50 for wages and £50 for board during period of service.

Mr. F. Carter for plaintiff.

Mr. Hoyles, Q. C., for defendant.

330 MARISTANY Y ELIAS *v.* GRIEVE, O'BRIEN
AND CHANCEY.

1859, *January.* HON. SIR F. BRADY, C. J.

*Practice—Pleading—Demurrer—Assault and battery—Defence ; Judicial acts—
How far plea must show a sufficient legal justification.*

In an action of trespass for assault and battery against two justices of the peace, and a policeman acting under their warrants, when the assault and battery is justified on the grounds of being justices of the peace, it must appear by the plea they had a legal justification and that they were acting as justices or that there were valid legal proceedings instituted to give them the character they claimed.

THE Chief Justice delivered judgment on the plaintiff's demurrer to defendants' special plea. It was an action of trespass for assault and battery and imprisonment. The defendants, Grieve and O'Brien, claimed to be acting as justices, and Chancey justified under their warrant. The plea of the two former is given below ; Chancey's plea was very similar. The plaintiff demurred because it was not sufficiently shown in the pleas that they were acting as justices, and their proceedings were not set out or shewn to be in strict conformity with the provisions of the 11th and 12th Vic., cap. 42, &c.

PLEA:

"And for a further plea in this behalf as to the assaulting the plaintiff and causing him to be apprehended and brought into custody in and through the streets of St. John's, from a certain dwelling-house to the Court House of St. John's, and there imprisoning him in the first court of said declaration mentioned, and as to the assaulting and imprisoning of the plaintiff in the said second court mentioned ; this defendant by leave, &c, says that the said supposed causes of action in the said courts mentioned, are one and the same, and that before the said time, when or in the said court mentioned, to wit, on the 26th January, 1858, at St. John's, aforesaid, the said defendants, Walter Grieve and Lawrence O'Brien, were two of Her Majesty's Justices of the Peace for the Central District of Newfoundland, and were then and there engaged and acting in hearing and inquiring into certain charges, then and there preferred by one, the Marquis de Cabellero, against one George Simms and other parties unknown, for having feloniously taken and detained divers monies, goods, and chattels, the property of the said plaintiff ; and upon such hearing and inquiry, it was then and there made to appear to the said defendants, Walter

Grieve and Lawrence O'Brien, by the oaths of John Devereux and other creditable persons in that behalf, that the plaintiff (he then being within the said district) was likely to give material evidence for the prosecution of the said charges, and would not voluntarily appear for the purpose of being examined as a witness, at the time and place, then and there appointed for the examination of witnesses against the said accused. Whereupon the said defendants, Walter Grieve and Lawrence O'Brien, issued their summons to the said plaintiff, under their hands, requiring him to appear before them and others, their associates, at the Court House in St. John's, aforesaid, *forthwith*, to give evidence concerning the charges aforesaid, and because the said plaintiff then and there refused to appear at the time and place mentioned in said summons, and no just excuse was offered for such refusal, and it being then and there proved upon oath to the said defendants, Walter Grieve and Lawrence O'Brien, that these summons had been personally served upon the plaintiff, the said defendants, Walter Grieve and Lawrence O'Brien, then and there issued their warrant, under their hands and seal, directed to the constables of St. John's, or to any or either of them, commanding them to bring and have the said plaintiff before the said justices at the time and place aforesaid, to testify as aforesaid; and these defendants further say that the said warrant before the said time, when, &c., was delivered by the said justices to the said Lionel T. Chancey, he being then and there a constable for the said district, in due form of law to be executed, and that under and by virtue of the said warrant, the said Lionel T. Chancey at the same time, when, &c., in the said declaration mentioned, at St. John's, aforesaid, gently laid his hands on the plaintiff in order to take, and did then and there take the plaintiff into custody, until the plaintiff afterwards and as soon as conveniently could be was carried to the Court House before the said justices for examination concerning the premises, and because the said plaintiff then and there on such occasion, he being thereto required by the said justices, refused to be sworn and to give evidence in that behalf upon the matters aforesaid. The said justices then and there issued their warrant under their hands and seals, directed to the constables of the central district, and to the keeper of Her Majesty's gaol of St. John's, commanding them respectively to take the said plaintiff and convey him to the gaol aforesaid, and there receive and detain him, for his contempt aforesaid, until five

pans a great many may be killed in two or three days, but they cannot be hauled within that time, but are marked with flags, pokers and other marks to define possession and to shew that the seals are the property of some person. It may then be a week or more before the seals can be got on board, or the crew may continue hauling, and thus clearly show that their dominion has not been abandoned; and if those seals are taken by force, or under cover of the dark, or in daylight, it matters not, the parties so taking them infringe the law by taking property rightfully belonging to the first killer, sculper and piler. In giving expression to well-known principles, which I am now only repeating, I am endeavoring to be so clear that we may not again hear in this court a repetition of a contrary doctrine, and that where seal pelts are piled within reach of their first takers, and where their vessel can take them if allowed, the men who deprive such vessel of the property only involve themselves in the serious consequences of interfering with their neighbours' rights and produce litigation and strife. Such being the state of the law as heretofore decided in reference to cases like the present, should you be of opinion that the plaintiffs killed, sculpted and piled and marked seals, and did not abandon them, and that it was not out of their power to get them, then the plaintiffs' first position is made out. If you are satisfied that the seals piled on the pan were the plaintiffs, then enquire did the defendant take them, and if so, then what was the quantity or number taken. It is the duty of the plaintiffs to satisfy you on these points, either by direct or circumstantial evidence. If you honestly come to the conclusion that the plaintiffs' seals were taken by the defendants under the circumstances stated by the plaintiffs' evidence, they are entitled to your verdict. If, on the other hand, the evidence is not sufficient to justify you in coming to this conclusion, your verdict must be for the defendants. If you come to the former conclusion, you will have to consider what was the number taken; and, looking at the whole of the testimony, supposing you take the lowest number, which will be the half of three hundred and seventy-three pelts, you will lastly have to find for the plaintiff at the rate stated by witnesses, as that at which seals sold in St. John's at from 37s. 6d. to 40s. per cwt., if you concur in thinking *that* the fair price. I must direct you not to take the question of interest into consideration, as no notice of any intention to demand it has been given. It is for you to say whether on your oaths you believe that Jackman

and the other defendants took seals belonging to plaintiffs, and that these seals would practicably in all reasonable probability have been recovered by them, and were not abandoned, and that the plaintiffs were in pursuit of them. If, on the other hand, you should believe the defendants did not take them or that the seals were derelict and abandoned, you will find for the defendants.

(Here His Lordship read the evidence).

If you believe this evidence, which is circumstantial and inferential in its bearing, and connecting these circumstances with the subsequent admissions of three of the defendants that they took Keefe's seals, and if you believe they made such admissions you will perhaps have little difficulty in coming to a conclusion. The defendants say that there is no direct evidence on behalf of the plaintiffs; they admit they took three hundred and eight seal pelts off a pan, they don't know whose—they say these seals did not belong to plaintiff; that the *Scottish Lass* or *Robert Arthur*, or some other vessel, was more likely to have taken the plaintiffs' seals, but that from the looseness of the ice, the wheeling of the ice, and the character of the weather, &c., assuming the seals to have been the plaintiffs, the chances of recovery were so slender as to amount to an almost downcast and a hopeless pursuit on the plaintiffs' part, and therefore they had ceased to have any property in them; if you are of this opinion, the defendants are entitled to your verdict.

Verdict for the plaintiffs, £133 13s.

Mr. Hoyles, Q. C., for plaintiffs.

Mr. Pinsent for defendants.

1859, *January*. HON. MR. JUSTICE ROBINSON.

Practice—Rule nisi—New trial—Misdirection—Vendor and purchaser—Insolvency—Vesting of property in purchaser, what is required.

On the 17th of October, A. D. 1857, the plaintiff purchased of one David Steele 6000 qtls merchantable fish, at 17s. 9d. per qtl., by notes at three months amounting to £5300, which notes were given for the whole amount at the time. The plaintiff received from time to time 4792 qtls., leaving 1208 qtls. to be delivered, when it was found that Steele had appropriated to his own use a portion of the fish sold, and had not sufficient merchantable fish remaining to complete delivery. It was finally decided to take other qualities at reduced prices to make up deficiencies. Steele wrote an order to his store-keeper to deliver to plaintiff a bulk of large Madeira and the balance in Labrador, without specifying any particular quantity. Under this order the Madeira was delivered on December 17th; on this date there were two bulks of Labrador fish in Steele's store, and these bulks were pointed out by plaintiff's broker as the ones from which he would take the quantity required; and out of one bulk 70 qtls. were taken when the store closed for the night, their culler being present to cull it. Next morning the defendants, as trustees under a deed of assignment executed the preceding evening, were in possession, and refused to allow plaintiffs to take any more fish. It also appeared that when taking stock, with a view of making the assignment, that Steele instructed his clerk to reserve the quantity due plaintiff; no such reservation was made in assignment. Plaintiffs brought action for the value of fish undelivered. At the suggestion of the court a verdict was entered for the plaintiffs. On a rule to have the verdict set aside, and a verdict entered for the defendant,—

Held (making the rule absolute)—In order to vest the property in the plaintiffs it should have been separated, set aside, and appropriated for the plaintiffs' benefit. Nothing of the sort had been done. The property never vested in the plaintiff.

A sale is not completed, and the property is not vested in the vendee, until there has been a delivery and acceptance, and such delivery is not completed so long as anything remains for the vendor to do, whereof the quality, quantity, price or identity of the chattel sold is to be ascertained.

THIS was an action of trover brought under the following circumstances:—The cause of action arose out of the insolvency of Mr. David Steele, of whose estate defendants were trustees, and thereby not personally affected in the action. The circumstances connected with this cause involved certain points of law upon which the parties sought the adjudication of the court. According to the evidence, David Steele sold in October, 1857, 6,000 quintals of fish through his broker, Mr. Mare, to plaintiffs, through their agent, Mr. R. Prowse, consisting of 1,000 quintals of large merchantable dry cod fish, 1,000 medium ditto,

and 4,000 small ditto, for which notes were passed and discounted, and subsequently went to the benefit of the creditors of David Steele, who, a few days after the purchase became insolvent. Shortly after it appeared there was not the quantity of Madeira agreed for in Steele's store, and it was then agreed between the parties (Prowse and Steele) to substitute a like quantity of Labrador fish for the quantity of Madeira deficient. There were two bulks of fish, one of which was delivered with 70 qtls of the other. In conformity with this agreement an order was given by Steele on his storekeeper to deliver the fish so purchased; part delivery to the extent of 5,047 quintals took place when a few days after giving the order for delivery to storekeeper, Steele becoming insolvent, gave on assignment all his property generally to defendants for benefit of his creditors. Mr. Carter, for the plaintiff, contended that the bargain for sale and delivery was perfected, inasmuch as a payment had been made for the whole bulk originally contracted for—there was a valid substitution afterwards of Labrador for Madeira. There was Steele's order for delivery of whole—there was a part delivery which coupled with payment and identity of property, binds the bargain and constitutes in law delivery of the whole. The contract gave to plaintiff a right in the property—the payment gave the full right of possession. The surrounding circumstances and incidents connected with the transaction, shewed there was a *bona fide* intention of full delivery. Defendants would rely on Steele's assignment of all his property to defendants which included his remaining fish in stores, and which defendants would contend included also in law the fish not delivered, but Steele's order for full delivery with the other circumstances of the case, shewed it was never contemplated to include non-delivered fish in the assignment. The law does not require the same actual delivery in articles of bulk and weight, such as constituted the bargain in question, as it does in articles of single or small size susceptible of immediate or easy delivery. Here then was all that the law required under the circumstances—a constructive or symbolical delivery of the whole; the defendants would probably rely on non-measurement, but here the quality and the quantity were clearly defined and ascertained in the first place, after which there was a part substitution—there was also a full payment, a part delivery, and an appropriation of the whole in law by plaintiffs. The claim was for the value of the residue of the fish, 953 quintals, £642 12s. Mr. Carter's demand for delivery was as follows:—

St. John's, December 18th, 1858.

Messrs. Walter Grieve and Gustav Ehlers,—

Sirs,—I am instructed by Messrs. Ridley & Sons, of Harbor Grace, to demand of you the immediate delivery to them or their agents of 953½ quintals cod fish, purchased and paid for by them from David Steele, and which by legal transfer and delivery vested in them as their property; I understand you have taken possession of this fish, and claim it under some recent pretended assignment from Mr. Steele, and refuse to permit Messrs. Ridley & Sons or their agents to remove it. As there is and can be no mistake about the said fish so purchased, paid for, appropriated and vested, Messrs. R. Prowse & Sons, their agents, are prepared to point out to you the said fish, the property of Messrs. Ridley & Sons, which you now unlawfully retain in the store of Mr. Steele, though I believe you are already aware of the loss of bulks which belongs to Messrs. Ridley & Sons. Should you persevere in refusing to deliver up this fish, you and each of you will be held personally responsible therefor or the value thereof, and all damages on account thereof to Messrs. Ridley & Sons.

Yours truly,

(Signed,) F. B. T. CARTER.

Mr. Steele's evidence, which had been taken *de bene esse*, he being out of the jurisdiction, was then read as follows:—

I sold through my broker, Mr. Mare, in October, 1857, six thousand quintals of cod fish to the plaintiffs as described in the sale notes produced, marked A, of the above date, for notes at three months, which notes were given, and when due, paid; Mr. Robert Prowse, junior, superintended the delivery on the part of the plaintiffs. All the fish of the description in the purchase note was not received by plaintiffs. The fish was in the store at the time it was sold; plaintiffs received between four and five thousand quintals, I can't state the exact quantity. Part of the fish intended for plaintiffs was subsequently bought by me. I had not in my store a sufficient quantity of the right description to make up the amount for plaintiff. This was in December, 1857. It was a day or two after I closed business, that a new arrangement was entered into with Mr. Prowse, that plaintiffs should receive large Madeira at fifteen shillings and sixpence in lieu of the first fish then not delivered. I gave an order on my storekeeper to deliver this fish in conformity with

this arrangement. This arrangement was made and the order given a day or two before I made any assignment of my property for my creditors. I don't know anything about the delivery of the fish under the new arrangement after I gave the order. I was not on the premises. It was to my storekeeper, Cowan, I gave the order, and he had full authority to select and deliver the fish and make arrangements in the matter. The notes had been given for the fish prior to this second arrangement and upon the delivery of the balance to plaintiffs there would be nothing due by them to me. I made an assignment of my property to defendants. It was executed on Thursday the 17th December, in the evening about eight or nine o'clock. I had only on that day arranged to give them the assignment, but I had spoken to Mr. Walter Grieve about it the day before and he had been to Mr. Hoyles and got the document prepared. Mr. Tasker at my instance had consulted with Mr. Walter Grieve as to the delivery of the residue of fish to plaintiffs, and he consenting, I gave the order to Mr. Prowse. After this consultation with Mr. Grieve and other parties, it was agreed that the plaintiffs should have the fish. In the quantity of fish assigned to defendants this fish to be delivered to plaintiffs was not included, but the quantity in the assignment was made up without including the fish to be delivered to plaintiffs. I don't remember having any conversation myself with defendants about the fish after Mr. Tasker spoke to Mr. Grieve and others, as before stated. Ridley's fish, according to the arrangement with Mr. Prowse, was not included in the fish assigned to defendants for my creditors. The quantity of fish mentioned in the assignment was made up at my request by my storekeeper, from the fish book, and supposing Ridley's all delivered, the balance would have been as stated in the assignment. There were twelve hundred and eight quintals due Ridley at the time the new arrangement was made with Mr. Prowse, and when the order was given. At the time of Mr. Tasker's consultation with Mr. Grieve, he had nothing more to do with the matter than any other of my creditors. I don't know what fish had been delivered after I gave the order and before the assignment. When I gave the order there was only one bulk of large Medeira in the store that was to be delivered, and Mr. Prowse was to select the Labrador from the bulks of Labrador in the store.

Mr. Prowse proved the bargain and sale; subsequent substitution of fish for that originally agreed for; payment and part delivery; also Steele's order for the whole bulk.

Peter Cowan, Steele's store-keeper, proved part delivery; received Steele's order for full delivery; gave part delivery under such order.

Mr. Mure was also called, who proved the original bargain and sale, and the purchase note, which ran as follows:

St. John's, Oct. 17th, 1857.

Sold Messrs. Ridley & Sons, per Messrs. R. Prowse & Sons, for and on account of Mr. D. Steele:

1000	quintals	Large	Merchantable	Dry	Cod-fish.
1000	"	Medium	"	"	"
4000	"	Small	"	"	"

6000 qtls. at 17s. 9d. per quintal.—Note at three months.

W. H. MARE, Broker.

The plaintiffs' case here closed, when Mr. Hoyles claimed a non-suit. In trover plaintiffs are bound to prove *possession*; all the property in Steele's possession passed to defendants by the assignment, and no property to the fish in dispute has passed to the plaintiffs, or had been appropriated or set apart by them, therefore they fail to maintain trover. It is a rule in law that where anything remains to be done to perfect a sale, the sale is incomplete until the same be done; here the fish was not weighed or culled, was not set apart and identified to pass the property in plaintiff, therefore no property passed. If any act remains to be done on the part of the seller, the property remains in him until that be done, and the vendor cannot maintain trover.

Mr. Justice Robinson—Suppose this fish to have been burnt the night previous to the assignment, whose loss would it be?

Mr. Hoyles—Steele's, of course.

Mr. Carter—Under the whole transaction the loss would be the plaintiffs'; possession was virtually given to plaintiffs' agent, and the fish remained there at his risk. The right of property was vested in the buyer by the original contract of sale (*3 B. and C. 364*), and the right of possession by payment (*4 B. & C. 148*). By statute of frauds earnest or part delivery will vest *all* in purchasers. Besides a specific appropriation by Steele for plaintiffs would, under the circumstances of this case, give plaintiffs legal possession (*Addison, 52*). The question of acceptance is one for the jury and not the court (*Add. 61; 5*

Taunton, 617; *Add. 54*; 9 *Ad. & El.* 895; *Hauton v. Myers, &c.*) The cases Mr. Hoyles relies on are cases arising out of unpaid vendees.

Judge Robinson—We have considered your objection, Mr. Hoyles; we are influenced with the importance of this case, both as respecting the parties and the commercial public, and suggest a verdict for the plaintiffs for amount claimed, subject to be reduced to the *bona fide* value of the pile of fish in question, or to be turned into a verdict for the defendants as the court, after full argument and due consideration, should determine. Verdict accordingly.

THIS case, like that of *Boden v Rogerson*, just decided, arises out of the insolvency of Mr. David Steele. There is a rule by which the plaintiffs ask to have judgment entered for them for £643 12s., or at least for £297, being the value of one pile of fish, from which they had commenced taking delivery, or the defendants ask to have judgment entered for them. The cause was tried on the 1st December last, when the jury found a special verdict for the plaintiffs for £643 12s., subject to be reduced to £297, or to have the verdict entered for the defendants as the Court shall after argument determine. It appeared that on the 17th October, 1857, the plaintiff purchased from David Steele 6,000 qtls merchantable fish, at 17s. 9d., by notes at three months, amounting to £5,300, which notes were given for the whole amount at the time. The plaintiff received from time to time 4,792 qtls, leaving 1,208 to be delivered, when it was ascertained that Steele had appropriated to his own use some of the fish which he had sold to the plaintiffs and for which he had been thus paid, and had not sufficient merchantable fish remaining to complete the delivery on the 16th Dec. Steele told the plaintiffs' agent, Mr. Prowse, that he had Labrador and Madeira fish; the agent said that that was not the fish they bought or wanted; but finally it was arranged for plaintiffs to take large Madeira at 15s. 3d, and Labrador at 13s. 6d., to make up the value of the merchantable. The plaintiffs were to have a certain bulk of large Madeira and a sufficiency of Labrador to make up the balance; that Steele wrote an order to his store-keeper to deliver to plaintiffs a bulk of large Madeira and the balance in Labrador, without specifying any particular quantity. Under this order the Madeira fish was delivered on 17th Dec.; there were then two bulks of

Labrador fish in the store, and Prowse, pointing to one of them, said 'I will take our Labrador fish out of that, and should there not be enough in *that*, I will take residue from *that*,' (pointing to another bulk); that the first bulk contained 510 qtls., and the other bulk about 1,000 qtls., and from the first bulk the plaintiff received 70 qtls., when they closed for the night, their culler being present to cull it. On the following morning the defendants were in possession of Steele's store with its contents, and refused to allow the plaintiffs to take any more fish, claiming the whole under a deed of assignment to them from Steele, executed the preceding evening, and the quantity of Labrador fish due plaintiffs, viz., 953 qtls. remained undelivered. It also appeared that when Steele was taking stock with a view to make the assignment to the defendants, he directed his clerk to reserve from the quantity of fish in his store the amount due to Ridley, but whatever may have been his intentions, or whatever might have been their effect, he does not appear to have carried them out and made such reservation in his assignment to the trustees.

With this state of facts before us we cannot but agree with an observation made with much propriety at the trial by Mr. Carter, that the law must be very clear indeed which will defeat such a fair claim as that of the plaintiffs—they paid for the fish they bought; they made no unnecessary delay in taking delivery; they found a part of their property, which, confiding in the vendor, they paid for beforehand, was misappropriated by the vendor, and when they were about to receive a substituted quality they were prevented from doing so in consequence of an assignment of the substituted property subsequently made by Steele himself to others, who, acting as trustees, cannot be blamed for standing on their legal rights. Although our sympathies may be with the plaintiffs, we have a higher duty to perform than the gratification of feeling; we must apply the law with a steady hand, and endeavour to prevent the mischief which would result from uncertainty in judicial decisions. It is impossible, in the face of the authorities we cited in *Boden vs. Rogerson*, to hold that any of the fish remaining in Steele's store vested in Ridleys, inasmuch as weighing for the purpose of ascertaining quantity, and culling for the purpose of ascertaining quality, were indispensable preliminaries to the full and complete delivery; it could not be ascertained whether there was (to use Mr Prowse's expression) "enough in the first bulk" until it had been weighed; nor how

much would be required out of the second until that also had been weighed. The rule of law is applicable to this case that so long as anything remains to be done by the vendor to perfect the sale the delivery is not complete and the property does not vest in the buyer.

It has been urged that the fact of the vendor (Steele) having been paid by Ridley's note, which was equal to cash, distinguishes this case from *Boden vs. Rogerson*, where the vendor (Rogerson) had not been paid, the vendee's note being worthless; but it is not so—the fact of complete delivery is not dependent upon payment in this case more than it was in *Logan vs. LeMessurier*. On the whole we feel bound, though with regret, to make the rule for entering the verdict for the defendants absolute.

In the above case Mr. Carter, for the plaintiff, cited from *Hanson vs. Meyer*; 6 East, 614; *Addison*, 52; 4 A. & E., 58; *Woods vs. Tussel*, 6, 2, B., 224; *Bask vs. Davis*, 2 M. & S., 397; *Barney vs. Poyntz*; 4 B. & Ad., 568; *Shipley vs. Davis*, 5 Taunton, 617; *White vs. Wilks*, 5 Taunton, 176; *Austen vs. Craven*, 4 Taunton, 644; *Chitty on Contracts*, 334.

Mr. Hoyles for defendant—*Rugby vs. Minet*, 11 East, 210; *Sagary vs. Furnell*, 2 Campbell.

Mr. Carter for plaintiffs.

Mr. Hoyles, Q. C., for defendants.

1859, *January*. HON. MR JUSTICE ROBINSON.

Practice—Rule nisi—New trial—Misdirection—Marine Insurance—Mutual Insurance Club—Construction of Rules.

A policy of insurance in the form of the rules of a mutual insurance club, contained (amongst others) two conditions, (1) that before sailing the vessel insured should be surveyed a second time; (2) that the vessel should have four anchors on board at time of sailing. The vessel was lost. In an action brought for the amount of the insurance the jury found for the plaintiff, notwithstanding that the second survey had not been held and it did not appear that four anchors were on board at time of loss. On a rule *nisi* to set aside the verdict—it was contended (a) that rule 10 which required a second survey was a duty imposed on the insured in the nature of a warranty, and (b) that rule 17, which contemplated the presence of four anchors on board was a condition precedent and conclusive on the plaintiff.

Held—The rules in question were merely directory to the committee of the club as to what they were to point their attention to, and not conditions precedent on the insured nor of such a character as to invalidate his insurance.

SUMMARY action of assumpsit brought by plaintiff against defendant in the last May term of this court, to recover £10 13s. 7d. currency, being his proportion to be contributed on the loss of the brigantine *Active*, recently the property of plaintiff. This case took up two days. According to the evidence, it appeared that in the month of March, 1857, the said vessel was at New Perlican, in charge of an agent. Plaintiff wrote to him to have the *Active* insured in the Mutual Insurance Club of Brigus, which insurance was accordingly effected on said vessel for the sum of £970 currency. The said vessel then left for the seal fishery, and returned to St. John's about the first May following; she had received injuries while at the ice, and plaintiff had her overhauled, repaired, and made seaworthy. The plaintiff, about the 25th May, hired the said vessel to one Norcott to go to Labrador; before leaving St. John's on that voyage Norcott desired a survey to be held, and asked defendant to attend at such survey, as one of the surveyors of said club, but he stated that the vessel should go to Conception Bay to be surveyed. Plaintiff telegraphed to the club to have the captain of the said vessel approved of; received a message in return from the secretary approving of said captain. The said vessel remained five days at Harbor Grace, but no surveyor from the club attended. She then left for Labrador, and arrived safely at Long Island, Labrador, and on the 15th September she was lost and became a total wreck.

The defendant relied on the following grounds of defence : unseaworthiness of the *Active* ; Rogerson did not sign and seal the rules of the club, his agent did so in his own name, and consequently is the only person insured. If Rogerson did so sign and seal said rules, he should abide by them, one of which rules is that a second survey is indispensable ; such survey must be made by three surveyors. no such second survey was made. This survey was a condition precedent. The vessel could not be insured without it. And it is not whether the vessel was seaworthy according to the opinions of certain nautical men, but according to the specific rules laid down by the club. Mr. Justice Robinson, in leaving the case to the jury, remarked on the nature of plaintiff's claim, the similarity in principle between these contributions and premiums of insurance. The same rule applies to a mutual insurance as to other insurance societies. There is not a doubt but plaintiff was actually insured. As to the vessel's unseaworthiness, that was a point entirely for the jury. This was a time policy, and unless plaintiff fully equipped his vessel he could not recover. The attention of the jury was directed to the *Active's* seaworthiness at the commencement of the summer voyage, and to take into consideration the rule of the club bearing on that point, and that the party who acted as agent for plaintiff insured the *Active* for him. Jury returned a verdict for plaintiff for £11 6s. 5d. currency.

In this cause Mr. Hoyle obtained a rule *nisi* on misdirection.

The plaintiff in this case had obtained a verdict, to set aside which defendant obtained the following rule : " It is ordered that the verdict in this cause be set aside, and a non-suit entered upon the point reserved, namely, that the *Active* not having been surveyed by the society before her departure for the Labrador, the plaintiff had no right to recover in this action, or that a new trial be had for misdirection in directing the jury that the plaintiffs were bound to satisfy the jury that the *Active* was seaworthy on the voyage from St. John's to the Labrador, and that in ascertaining that fact they should give weight to the 17th rule, without reading it, as absolutely conclusive upon the plaintiff, unless cause be shown to the contrary."

The rules of the Mutual Insurance Society of Brigus, referred to in the foregoing rule of court, were the 10th and 17th :

"X.—The duty of the surveyors is when requested (and being satisfied that the owners have signed the rules) to examine the vessel proposed for admission and see that she is well found in anchors, cables and sails, that she has four good braces on the sternpost, and is supplied with a good spare rudder, fully mounted, together with every other requisite; and particularly to ascertain that the hull is tight, staunch, strong, and in all respects fit to encounter the dangers and difficulties of the proposed voyage. It shall also be incumbent on them to see that a fit and proper place is provided for the gunpowder in each vessel previous to their survey. They shall be satisfied that the master is competent to take charge of the vessel. No change of masters shall take place without the consent of the surveyors, expressed on the back of the certificate, except in a foreign country where the change is unavoidable, and the consent of the surveyors cannot be obtained. And having in every respect satisfied that no impediment exists against her being received, they shall examine her register and copy the heads thereof in their record book, with the value they propose; they shall then deliver the owner or broker a certificate of her being accepted, stating the sum they value her in, which certificate shall be security to the owner and as valid as a policy issued by Lloyds. They are to survey and mark one boat with each vessel; every vessel shall be inspected by not less than three surveyors. No person shall survey a vessel in which he is interested. For the due performance of these duties the surveyors are to receive from the owners six shillings for the first and six shillings for the second survey for each vessel surveyed and admitted into the scheme. Vessels entering in the spring must be surveyed before they proceed on the sealing voyage, and again previous to their sailing on any other voyage or voyages within the limits prescribed by these rules, whether foreign or otherwise, the surveyors in each case giving a certificate to that effect; and in case of a vessel sustaining damage at any time, she shall be especially surveyed. It is the duty of the surveyors to deliver up their record book to the secretary immediately on the surveying times having expired, which is, for vessels bound on a spring sealing voyage until the last day of April, and for the fishing and coasting only until the last day of June; after which time no vessel will be admitted into the scheme, Two surveyors shall be deemed sufficient for a second survey or a change of masters, where the master is known to the surveyors; where the master is unknown to them it shall be necessary to

obtain the additional consent of two of the committee. Should the surveyors be required to survey any vessel ready for sea on or after the 24th day of February they are hereby authorized to do so, such vessel not to be covered by the society, not to sail, nor any certificate to be granted, until 8 a. m. on the first day of March."

"XVII.—Should there be application from owners of vessels belonging to and fitting out for the sealing voyage in ports on the south side of Trinity Bay for their admission into this scheme, it shall be lawful for any seven of the committee to appoint a surveyor or surveyors for the purpose of inspecting such vessel or vessels, and if upon the report of such surveyor or surveyors it shall appear to the committee that such vessel or vessels are well and sufficiently provided in sails, rigging, ground tackle, and every other requisite as required by the rules of this Society, and that the vessel is strong and well-built, and of the first class or description of vessels employed in the trade in which she is engaged, and that her commander is a person whom they approve, and then the said seven committee men shall be and are hereby empowered to admit such vessel or vessels into this scheme at a valuation to be fixed by them; should the committee value any vessel at more than twelve hundred pounds currency, the owner shall be at liberty to insure the extra value in any other society of underwriters.

"The committee acting under this rule shall in no case admit a vessel of inferior or doubtful condition; any vessel entering this scheme under this rule shall be provided with two bower chains and two anchors, one stream cable and one stream anchor, one towline and one warp and kedge; and on the sealing voyage with a good spare rudder fully mounted, and that she has four good braces on the sternpost, all of good and sufficient size and quality, according to the tonnage of the vessel.

"No change of masters shall take place under this rule without the approval of five of the committee expressed in writing.

"The charge for surveying in all cases to be paid by the owners.

"Owners of vessels entering the scheme under this rule shall, either in person or by his or their agent duly appointed, subscribe to the rules of this society on or before the 20th day of February, and be governed by the same in all things the same as a resident member."

Mr. Carter now shewed cause and contended that the terms of these rules were in the affirmative and not in the negative;

that they were directory and not conclusive; that assuming them to be parcel of the contract binding upon the defendant, that he had performed his part by his request to the defendant, who was one of the surveyors, and who was in St John's at the time, and who refused. That the plaintiff had also telegraphed to Brigus, naming the change of master and the voyage the vessel was going on—which was sufficient to enable the committee to have surveyed if they pleased, and was also evidence of the vessel still continuing in the scheme. Plaintiff had done all he could to notify, if there had been any neglect of duty it was with the committee. Further, that there had been no repudiation but a recognition of the continuance of the *Active* in the scheme—she had contributed in June to a loss at the previous seal fishery.—*Addison, 191; Havelock vs Gedder, 10 East, 565.*

Judge Robinson did not see that the assent to the change of master had anything to do with the survey, if that were a condition precedent on the plaintiff.

Mr. Carter—It shewed the committee knew of the voyage and of the vessel's going to Harbor Grace, where they could have surveyed her. The learned counsel then contended: secondly, that as the vessel was shewn to be seaworthy at the commencement of the risk, that the warranty related only to that time as this was a time policy, and was similar in this respect to a policy for a particular voyage.—*Small vs. Gibson, 162; B. 140; Hollingworth vs. Brodrick, 7; A. & E., 47; Sadler vs. Dickson.*

Judge Robinson—If a vessel was on a voyage upon which the crew became decimated, or the foremast carried away with the opportunity of repairing the loss, would you say you could recover; I would suggest that a time policy would continue good, unless the unseaworthiness were unknown to the master or owner.

Mr. Carter continued—The *bona fides* of the loss was not questioned; the seaworthiness of the vessel was fully established. If bound by the 17th rule, the plaintiff had proved compliance with it. Norcott said there were five anchors, and the Court in charging put it thus: whether there was anything to fix the weight of the anchors, but that, upon a fair construction, the jury should give the defendant the benefit of the rule. The jury found that the rule had been complied with, and, by a majority of witnesses, the vessel was shewn to be sufficiently supplied. The Court had given the defendant the fullest bene-

fit of the rule, as they had made the seaworthiness of the vessel depend upon her state as if she had been insured particularly for the Labrador voyage. But the rules merely directed the duty of the officers of the society—did not affirm any condition to be observed by the owner.

Mr. Hoyles, contra—The rule of the club provided that the vessel should be surveyed before going on another voyage; such had not been the case. These rules are the contract between the parties—when the vessel is surveyed a certificate is given, not as the contract, but to show that the conditions have been complied with; the second survey is to be endorsed upon the certificate. It is obligatory on the plaintiff to have the second survey done. It is a condition precedent, without which there is no insurance. The second survey is necessary to effect an insurance for the second voyage, which is a distinct risk.

The tenth rule provides for both cases—the insurance for the Labrador voyage amounts in effect to a second reception. The responsibility is with the owner, it is his duty as well as his interest. The request is to come from him to the surveyors, except in one particular case, which proves the general rule. The scope and object of the rules are confined to Conception Bay, which is the residence of the committee and surveyors, and where the survey is to be had; the request to them must be a valid one; there had been nothing of the kind. A survey by Spracklin in St. John's would have been no use, but a breach of the rules. How are the committee to act unless requested? The committee had no power to waive a survey—but they had not done so, affirming the change of master was a distinct thing. It is a warranty, and express contract on the part of the plaintiff.—*Arnold, 578-583-689; Harrison v. Douglas, 3; Ad. and Ellis, 390; Stewart v. Wilson, M. & W., 11.* The jury were to say, not whether the vessel was seaworthy in their opinion, but whether the rules had been complied with; the parties have chosen and contracted to fix a standard so as to set such questions at rest, and it is imperative upon the insured; it was absurd to say that to carry boat anchors was a compliance with the rule; it might in the same way be contended that a toy anchor was a compliance with the rule. The rule must have a fair and reasonable construction.—*4 M. & G., 257.*

The Court took time to consider, and at a subsequent day Judge Robinson delivered judgment.

This was an action brought to recover £970 currency, the insurance on the schooner *Active*; the plaintiff and defendant were members of the Mutual Insurance Club of Brigus, and the rules of the club were put in evidence as the ground of the action, there being no formal policy in the case.

At the trial Mr. Hoyles, as counsel for the defendant, moved for a non-suit, upon the ground of a failure in the plaintiff to have a second survey of his vessel, pursuant to the 10th rule, before she proceeded on her summer voyage, which, he contended, was a duty imposed upon him in the nature of a warranty. The learned counsel also obtained a rule for a new trial upon the ground of misdirection, the judge not having instructed the jury to consider the 17th rule of the club as a condition precedent upon the plaintiff and conclusive upon him.

The loss of the vessel was admitted to be *bona fide*; the jury were instructed to consider whether the vessel, on her sailing for the summer voyage, was in every respect seaworthy, which she must have been to enable the plaintiff to recover; and that in considering such question they might fairly and ought properly to have reference to the provisions of the said 17th rule, which contemplates the presence of four anchors on board, without however holding themselves conclusively bound by the words of the rule; there was evidence of there having been five anchors on board, two of which were boat anchors.

We agree with Mr. Hoyles that the rules must be considered as constituting the policy, and that the points raised are questions of constructions of these rules.

The 17th rule empowers the committee to appoint surveyors for the inspection of certain vessels whose owners should desire their admission into the club, and goes on to direct that "the committee acting under the rule shall in no case admit a vessel of 'inferior or doubtful condition': any vessel entering this scheme under this rule shall be provided with two bow-chains and anchors, a stream cable and stream anchor, and one towline and warp and kedge"; and then the rule proceeds to provide for the payment of the expenses of such survey. Now, we must look at the object and meaning of this rule, and not put upon it a forced construction for the purpose of creating a warranty, which must literally be fulfilled, where the words and scope of it do not necessarily show such to have been the intention of the parties. The rule has reference to the conduct of the committee, and its object is avowedly to prescribe to

them and their surveyors what their duties shall be; the attention of the committee is directed to certain things, for which attention there would be no need whatever if the insured were to be provided with them at the peril of his insurance. To use the language of Lord Denman in *Harrison vs. Douglas*, 3 A. & E., 402, which was a case arising out of the rules of a Mutual Insurance Club, and very similar to the present: "We are of opinion that what is said in the rule is directory to the committee as to what they were to point their attention to," and not a condition precedent upon the plaintiff; and we think that the charge of the judge to the jury was correct, and that the defendant had all the benefit of the 17th rule to which by law he was entitled.

As regards the application for a non-suit in consequence of the vessel not having been surveyed before her summer's voyage under the 10th rule, that likewise is to be determined by the construction of the rule last cited; it might well have been drafted more perspicuously, but still the question we have to determine, through whatever ambiguity may surround it, is whether it imposes a duty upon the insured in the nature of a condition precedent to have had a summer survey held upon his vessel—she having been formerly surveyed and admitted into the club in accordance with the 17th rule.

The 7th rule of the club prescribes the machinery for the management of its business; the 8th prescribes "the duty of the committee," &c., and the 10th (the one under consideration) prescribes "duty of the surveyors is when requested to examine the vessel proposed for admission, and see that she is well found in anchors," &c.; it limits the fees these surveyors are to receive, and goes on to say, "vessels entering in the spring must be surveyed before they proceed on the sealing voyage, and again previous to their sailing on any other voyage; the surveyors in each case giving a certificate," &c. It will be observed that these words are in the middle of a rule, the avowed object of which is to describe the duty of the surveyors.

In *Harrison vs. Douglas* the language of the rule was "all ships are to be inspected and approved by the committee before admission, and all chain cables are to be properly tested." It was urged that the chain cable being "properly tested" was a condition precedent on the insured, but the Court of Queen's Bench held that it was not that the words were in a rule which referred to a committee, and were only directory on the committee.

In this case we are of the like opinion, we think that the second survey was a duty incumbent upon the surveyors to perform when they should be required, and not a covenant on the part of the insured; and that by not having had such second survey the insured would not necessarily lose his insurance, although he might expose himself to the necessity of giving ample proof that his vessel was thoroughly seaworthy, which he did to the satisfaction of the jury. The rule must, therefore, be discharged.

AINSWORTH v. CUSACK

1859, *January*. HON. MR. JUSTICE ROBINSON.

Practice—Attachment charging shares in Bank—18 Vic., cap. 4—Transfer of shares—Registration—Bye-laws—Power of Bank to hold shares against liabilities accruing.

The defendant, being the registered owner of certain shares in the Union Bank of Newfoundland, by order dated in March, requested the manager to transfer the said shares to the Savings' Bank. This order was presented to the Union Bank in July, but was not complied with for the reasons (1) that on the day of the deposit of the order the defendant had assigned for the benefit of creditors; (2) that promissory notes of the defendant were held by the Union Bank, and the shares were not transferred in order that if the notes were dishonored the share would be there to respond; (3) that in order to constitute a valid transfer the assent of two directors was necessary under the bye-laws of the Bank, as was also the subscription of the bank stock by purchaser and seller. In the following month of August the plaintiff attached the shares in the said bank under final process.

Upon a rule calling upon the Savings' Bank to show cause why the said shares should not be sold,

Held—The bank had no power to hold the shares except for a liability actually due and existing.

Held—The bye-law which required the assent of the directors to an assignment was void in law, but whilst a remedy existed for the Savings' Bank against the Union Bank for not registering it did not bar the operation of the attachment which prevailed, the shares not having been transferred and still vesting in the defendant when the warrant was laid.

THE Newfoundland Savings' Bank was called upon by rule of court to show cause why five shares in the Union Bank lately belonging to Messrs. Cusack & Sons, the defendants,

should not be sold to respond to the plaintiff's attachment under the 27th section of the Union Bank Incorporation Act. Mr. J. W. Smith had been examined on a previous day, and deposed to five shares standing in the name of the defendants. He was now cross-examined by Mr. Pinsent, and said the attachment was laid on the 25th of July. On the 22nd July, four days before, we received a notice from the Savings' Bank that the shares had been assigned to them by the defendants on the 15th of March. The notice is in sufficient form for the directors to complete the transfer, if they had not other reasons for refusing. They did not transfer because there were bills endorsed by Mr. Cusack then running in the Bank, which we were doubtful about being paid, the joint amounts of the notes might be under a hundred pounds, but I cannot say without referring. We had another reason for refusing; Mr. Grieve, the president, said that that day, the 22nd of July, Messrs. Cusack had made an assignment to him of all their property, in which he presumed were embraced these shares. If it had not been for these reasons, we should have effected the transfer. I remember a conversation with Mr. Morris, cashier of the Savings' Bank, in which he said that if there were any legal liabilities due by defendants to the Union Bank, the Savings' Bank would bear them harmless.

Re-examined by Mr. Hoyles.—The notice was handed to me by Mr. Morris (here Mr. Smith put in the bye-law of the Union Bank, objected to by Mr. Pinsent.) There was no transfer of the assignment to Mr. Grieve. Mr. Grieve raised the objection at a meeting of the Board; the Savings' Bank did not tender any guarantee. Cusacks were shareholders from the commencement, 1855.

BYE-LAW.—(REGISTRY OF SHARES.)

“Shares may be sold at any time, the consent of the directors being obtained to their transfers, this consent to be signified by two directors at the board affixing their signatures to the application for permission to transfer. Before transfer the applicant must deliver up his certificate of shares to be cancelled, and, if only part of his shares are intended to be transferred, a new certificate of the number he still retains shall be given; until the transfer deed shall have been signed by the seller and purchaser, the shares cannot be considered to have been transferred. Shares may be registered in the name of one, two or three individuals, any one of whom can draw the

dividends, but all the names will be required on transferring the shares."

Mr. N. Cusack, examined, deposed to the firm having received money from the Savings' Bank on the security of their premises, and four hundred pounds additional on the further security of these shares; this was in March. The assignment was executed 22nd of July; this is the assignment. "We executed a general assignment for the benefit of creditors the same day. The shares in the Union Bank are in my name; the order or notice to the Union Bank to transfer to the Savings' Bank, and the assignment to the Savings' Bank, are dated on the day we received the consideration, viz., the 15th of March; we never received any certificates of shares, if there are any the Union Bank has them. Mr. Walter Grieve was asked by the Court if he urged his assignment, to which he replied that his functions under it had closed. I received the assignment of the Savings' Bank, and that to myself in the same envelope on the 23rd July, before the meeting of the directors.

The Attorney General submitted that under these circumstances the shares were not attachable—that they were the property of the Savings's Bank.

It would be contended that under the 12th section of the Union Bank Incorporation Act no assignment of shares should be valid or effectual unless entertained and registered in the book. The Savings' Bank could not help that; they had done every thing they could do: had received a valid assignment; had given due notice: had been refused on illegal grounds: could such an act on the part of the Union Bank render nugatory the defendants' assignment. The property had passed out of the defendants.

As to the plea that the Union Bank could retain these shares as security for running notes—that was clearly not law under the 26th and 12th sections, which applied only to such as were due and payable. The provisions of the bye-law were illegal beyond the power of the directors to make. Grieve's assignment was subsequent. Would it be contended that if the registrar of deeds wrongfully refused to registrar the deed first deposited, the law would give the subsequent assignee the superior right?

Mr. Hoyles: There are two parties contesting this right; unless they can shew their title the plaintiff has the right under his attachment. By taking the more formal assignment the Savings' Bank admits the worthlessness of the first—the

order or notice. The assignment would be sufficient in terms if all the statutory regulations had been complied with. The bank has the right under the Act to make the rule—the observance of the rule is a condition precedent before the assignment can be valid.

No transfer of shares, the Act says, can be valid or effectual without entry and registry—the property, therefore, has not passed out of the defendants nor been conveyed to the Savings' Bank. The defendants had, before the laying of the attachment, the disposing power: suppose the case of an assignee in bankruptcy, would not the property become vested in the assignee, notwithstanding the assignment to the Savings' Bank? The notice to the Union Bank could not affect the plaintiff's rights in this case.

Mr Pinsent replied: The absurdity of the position of the Union Bank as to running liabilities was apparent on reading the 27th and 12th sections together: it would require very clear words to sustain any other position. It is contended in the same breath that the plaintiff is entitled to the shares as against the Savings' Bank, and yet that Grieve's subsequent assignment can prevail against ours. It is not relied on by the assignee himself, and its terms are general, not specific, and do not in terms convey the shares. The order or notice to the Union Bank, expressed to be for value received, was a sufficient transfer. It will not be contended that if a man purchase land by agreement, and afterwards takes a more formal conveyance, that his title dates from the time of execution of the latter. A receipt is held to be sufficient to pass land, how much more stock!

The bye-law contains provisions repugnant to the common law right of disposition over one's property, and imposed restrictions inconsistent with and beyond the Act. If allowed it would bar the power of assignment; and, as to the certificates, there were none to deliver up. The bye laws were only designed for the internal regulation of the bank—they were not promulgated—contrary to every Imperial Act which fixed a public mode and period—*Grant on Corporations*, 77, 79, 81, 83,—the Savings' Bank had done all the law required. As to the Act requiring entry and registry, that was a matter for the Union Bank to carry out, which they could only refuse on legal grounds; the Court would put a reasonable construction on the Act. The Union Bank could be compelled in equity or by a mandamus to register—and the Court must hold that if the

strictly legal title was not in the Savings' Bank the equitable title was. The Union Bank asks the Court to assist them in a legal fraud, that they may avail of these shares as security for the notes Ainsworth's title was incomplete until similar requisites had been performed. If the reasoning applied to this case by the plaintiff's counsel was good, it would apply equally to the case of the assignee of a bankrupt. The defendants have, under the law of attachment, no "present interest or disposing power."—*Sec. 6, Vic., cap. 10, sec. 7.*

The rule in this cause calling on the Savings' Bank to shew cause why the shares of the defendant in the Union Bank should not be sold to respond to the plaintiff's attachment, having been argued at length, as reported in our last, and the court having taken time to consider, Mr. Justice Robinson at a subsequent day delivered the following judgment:

In this case the manager of the Union Bank, Mr. Smith, was examined as garnishee by Mr. Hoyles on behalf of the plaintiff for the purpose of ascertaining whether there was any property of the defendant in the Union Bank on the 8th August last, when a warrant of attachment under final process for £183 Os. 2d. stg. at the suit of the plaintiff was laid. Mr. Cusack, the defendant, was also examined on behalf of the Savings' Bank. Mr. Smith stated that at the time the attachment was laid in his hands, the defendant was the registered owner of five shares in the stock of the bank, of the value of £300 and upwards. That about the 23rd July the cashier of the Savings' Bank presented to Mr. Smith an order from Cusack, dated in March last, requesting the Union Bank to transfer his shares to the said Savings' Bank; that on the same day Mr. Walter Grieve, the president of the bank, informed the manager that Cusack had that day assigned to him in trust for his creditors all his property of every kind, in which he supposed these shares were included. Mr. Smith further stated that there were promissory notes then lying in the Union Bank for an amount not exceeding £100, whereof the defendant was endorser, which were not then due, but which the bank apprehended would be dishonored, and for the purpose of keeping the defendant's shares to respond to the amount of such notes in case they should be dishonored, as well as on account of the other matters referred to, the directors of the Union Bank refused to assent to the transfer of the shares to the Savings' Bank, and they were not transferred. That by a bye-law of the bank the assent of two directors to a transfer, and the sub-

scription of the bank stock book by seller and purchaser of shares, are conditions precedent to the validity of any transfer, and that such assent not having been given, or subscription made, the shares still remained in the name of Cusack. Mr. Cusack stated in his evidence that in March last he agreed for a valuable consideration to assign his shares to the Savings' Bank, and that the assignment which is dated March was in fact not executed until the 23rd July. Mr. Grieve stated to the court that the exigencies of the trust deed to him had been fulfilled, and that he had no claim upon Cusack's said shares.

Under this state of facts several questions of importance arose. The Union Bank contended that by virtue of the 27th section of their Act of Incorporation, 18th Vic., c. 4, which provided that an attachment should not bind shares of a stockholder except for an amount beyond his 'liabilities' to the said bank, they were justified in holding Cusack's shares to meet the possible dishonor of the notes then lying in their bank, for which he was liable as endorser, although they were not then due; but we are of opinion that the bank were not so justified, for although the word "liability" is used in the 27th section the meaning of it is explained lower down in the same section to be "an amount due," and the 12th section having reference to transfers, expressly enacts that before a shareholder shall transfer stock, he shall discharge all debts "*actually due and payable*" to the bank, shewing that the demand which the bank should possess on a shareholder to entitle it to a preferable claim on his shares must be an existing debt, both *debitum et solvendum in presenti*. The Savings' Bank then interposed and claimed Cusack's shares by virtue of the assignment executed by him to them on the 23rd July, on which they gave Mr. Smith notice, and which they required him to register pursuant to the provisions of the Act of Incorporation, such assignment, notice and requisition being all prior to the plaintiff's attachment.

The 12th section of the Bank Act enacts, "shares shall be assignable and transferable according to such rules and regulations as may be established in that behalf (provided the same be not contrary to law—Sec. 1), *but no assignment or transfer shall be valid or effectual* unless registered and entered in a book to be kept for that purpose, nor until the person making the same shall previously discharge all debts actually due and payable to the bank."

The Attorney General and Mr. Piusent contended on behalf of the Savings' Bank that they had obtained a prior assignment of these shares; that they required the Union Bank to perfect such transfer; that the bye-law which vested in the directors the assumed power of preventing an assignment by their dissent was void in law; that the refusal of the Union Bank to register the transfer was unjustifiable; that the Savings' Bank should not suffer by the act or error of the Union Bank, and that the property in the shares must be considered as having vested in them effectually. We cannot, however, enter into these considerations in the face of words of the statute, which are not only express but negative, and which declare that *no* transfer shall be valid or effectual unless registered; if the Union Bank have wrongfully occasioned any injury to the Savings' Bank, the latter has its remedy as it may be advised, a proceeding by civil action for refusing to register the transfer was the course adopted in the case *Gregory v. E. J. Company, 7 Queen's Bench, R. 199*, in which the plaintiff sued the East India Company for refusing to transfer in their books stock to a purchaser on request. We are therefore of opinion that the transfer to the Savings' Bank was not complete and effectual at the time the attachment was laid, and did not bar its operation.

Boyson v. Gibson, 4, C. B., 121, decided in 1847, supports this view. a ship registered under 3 and 4, William 4, was conveyed by the registered owner to B for a valuable consideration by a bill of sale executed before, but not registered until after B's bankruptcy: the 34th section enacted "*that no instrument shall be valid to pass the property in a ship or for any other purposes until such bill of sale shall be registered by the proper officer,*" it was held that B acquired no property in the ship, but that it passed to the bankrupt's assignees, "the effect of the statute being that until registration, every disposition by the act of the vendor, or of the law was as effectual as if such unregistered deed had not existed."

So also in a later case *doe dem., Jones v. Jones, 5 Ex. R.*, decided in 1850, an assignment was made of turnpike tolls, the statute directed such assignments to be registered without using negative terms, it was contended that there being no negative terms, the clause was only directory; but the court held that such registration was a condition precedent to a valid transfer.

It will be observed that we do not determine whether the Savings' Bank have or have not an inchoate right, capable of being perfected into a valid transfer of so many shares as may remain legally undisposed of, at the time of such right being perfected.

The only question that remains, and by far the most difficult is whether under these circumstances there remained to Cusack "a present interest and disposing power" over the shares so standing in his name, at the time the plaintiff's attachment was laid, which under our act he must have had, to render the attachment available; numerous authorities might be cited to raise at least grave doubts of the validity of attachment, and reasons not devoid of weight might be urged to show that although the transfer to the Savings' Bank may not have been complete to vest in them the share, it was sufficiently so to divest Cusack of a present interest and disposing power over them. We have examined the authorities and given much consideration to the point, and having reference to the language used in *Boyson v. Gibson* and other causes, as well as to the provisions of the Union Bank Act, we think that these shares continued the property of Cusack; there must be some legal owner of them, and as the transferee had not become, so the transferor had not ceased to be such owner, and therefore that the attachment bound them.

The case *Fuller v. Earle*, 7, *Ex R.*, 796, confirms this view, it decided that shares in a joint stock company for which the owner had executed a transfer, but which were not transferred into the name of the transferee, were subject to a judge's order under the 1st and 2nd Vic., as "shares standing in the defendant's name in his own right."

A judge's order under that act, is similar to an attachment under ours.

It is proper for us, in conclusion, to add that in our judgment, any bye-law of the Union Bank which prescribes the necessity for the consent of two directors to every valid assignment of its shares as a condition precedent to such assignment is one which the bank had no authority to make, and is invalid. The Legislature expressly provided that the shares should be assignable, and such a discretionary power in the directors would operate as a restriction upon transfers, and might have the effect, as was in the present case, of defeating the provisions of the statute. In Grant's law of Bankers, p. 186, it is stated, that a clause in a deed of settlement, "making the approbation of the directors

necessary to the sale of shares, has no effect of itself to limit the assignability of them, in practice the shares are transferable notwithstanding," and for that position the authority of Mr. Baron Parke in *Connell vs. Graham* is cited. We do not see anything to warrant the slightest imputation upon the integrity or motives of the Union Bank in this transaction, they acted for their own protection under a mistaken view of the law. On the whole, we are of opinion that the shares of Cusack are liable to be sold to an extent sufficient to satisfy the execution of Ainsworth.

Mr. Hoyles, Q. C., for plaintiff.

Hon. Attorney General and Mr. Pinsent for Savings' Bank.

DAY v. BARRON ET AL.

1859, *January*. HON. MR. JUSTICE ROBINSON.

Contract—Fishery agreement to purchase produce of voyage at "customary price"—Rule to ascertain meaning of "customary price."

Where an agreement contained a clause that the defendants were to pay the plaintiff the "customary price" for the produce of his voyages at the seal and cod-fisheries, the judge trying the case told the jury that in arriving at what were "customary prices" for the produce referred to, they should not be governed either by the highest or the lowest price given at the date of the various transactions.

THIS was an action brought upon the following agreement.

Memorandum of agreement made and entered into at Saint John's Newfoundland, this twenty-fourth day of October, in the year one thousand eight hundred and fifty-seven, between P. M. Barron & Co., of St. John's, aforesaid, merchants, of the one part, and James Day of St. John's, aforesaid, in the said island of Newfoundland, of the other part,—Witnesseth that the said P. M. Barron agrees to sell to said James Day the brigantine *Mary Bell*, burthen per register one hundred and twenty-four tons or there about, with all her tackle and appurtenances, as she now lays in the harbor of St. John's aforesaid for the sum of fourteen hundred and seventy-five pounds current money of Newfoundland, payable in four years in half-yearly instalments of one hundred and eighty-four pounds seven

shillings and six pence currency, on the twenty-fourth day of May, and twenty-fourth day of October in each year.

That the several instalments of purchase money of said vessel, the *Mary Bell*, as above mentioned, shall be paid at or before the times and dates named for payment thereof, over and above all advances and supplies made by P. M. Barron & Co. on account of James Day, or said brigantine *Mary Bell*, and that all credits in account with said James Day, or vessel *Mary Bell*, presently appearing or which shall hereafter be made, shall first be placed to the liquidation of supplies and advances made or given by P. M. Barron & Co., from time to time on account of James Day, or brigantine *Mary Bell*, until all such be fully paid for. After which the residue of credits appearing on dates set down for payment of the several instalments of purchase money of said brigantine *Mary Bell*, shall go towards payment of said instalments respectively.

That should the said James Day be able either from success at the fisheries or any other cause, to pay up the full purchase money of said vessel, sooner than the time and dates specified for payment thereof, he will pay up the same when so able, it being nevertheless understood that said James Day is bound to continue taking all his supplies required for use of said vessel, and the fisheries, from the said P. M. Barron & Co. until the end of the term allowed for full payment of purchase money of the brigantine *Mary Bell*, namely, the twenty-fourth day of October, eighteen hundred and sixty-one.

That said James Day shall take all supplies and outfits required by him for the usual purposes of the fisheries and his business from said P. M. Barron & Co. which shall be furnished at St. John's customary dealing prices and terms, and so continue until termination of this agreement.

That six per cent. shall be charged said James Day upon the balance due by him to P. M. Barron & Co. on the 31st day of December, 1848, and on the amount due on the same date in each succeeding year until the whole amount of the purchase money and supplies be paid.

That said James Day is to keep said vessel *Mary Bell* with all her freights regularly insured at his own cost and expense, and to have the said vessel kept regularly in good and sufficient repair at his own cost.

That no voyage can be entered upon by said James Day, without consent of P. M. Barron & Co. having been first had and obtained.

That said P. M. Barron & Co. are to purchase from said James Day the produce of his voyage at the seal and cod fisheries, at St. John's customary prices and terms.

That until full and complete payment of all the within named instalments of purchase money of said vessel *Mary Bell*, together with all advances and supplies made and given by P. M. Barron & Co. on account of said James Day or brigantine *Mary Bell*, the said brigantine *Mary Bell* shall remain and continue to be owned by said P. M. Barron & Co. and registered in their name, as if this agreement had never been entered into.

That upon the full and complete payment of the within named fourteen hundred and seventy-five pounds, all charges, advances and supplies made to said James Day on his own account or for said vessel *Mary Bell*, being first paid and fully liquidated, then a transfer of registry of said brigantine *Mary Bell* shall be given by said P. M. Barron & Co. to beforenamed James Day.

Witness our hands at Saint John's, Newfoundland, aforesaid, the day and date first before written.

P. M. BARRON & Co.
JAMES DAY.

Witness—LAURENCE BARRON;
JOHN HEARN.

The breaches of the agreement for which the plaintiff sought to recover damages were those stipulating that supplies and outfits should be furnished at St. John's customary dealing prices and terms, and that the produce of voyages were to be paid for by defendant at similar prices. But parties had dissolved their connection under that agreement some time in December, 1858, and the plaintiff went to deal with another merchant. The plaintiff swore that it was expressed at the time that the accounts were to lie open for correction.

The defence was that accounts had been finally closed then, that the prices charged and allowed were according to agreement, that defendants were entitled to charge interest upon the balance due at the time of the dissolution.

There was very considerable evidence on both sides as to customary dealing prices.

Mr. Justice Robinson charged the jury. After explaining the nature of the action, and having read the agreement, said that there was one preliminary view of the case upon which

they were to determine, if they were satisfied that the parties at the time of dissolving their connection had gone over and mutually adjusted their accounts, and that their notes for three, six and nine months given by the plaintiff were a final adjustment of his balance, then he should not be allowed to re-open them, but should be bound by arrangement, and the defendants would be entitled to their verdict with regard to the supplies. The plaintiff on oath denies such adjustment; the defendant asserts in so far at least as the goods supplied were concerned, that the giving and taking of the notes was a final adjustment, and while the fact of the passing of such notes is evidence in favor of the defendant's position, they would also remember that the vessel *Mary Bell* was registered in the names of the defendants, and that without obtaining a transfer by giving the bills, he could not have got the title to her or the legal right to make use of her. The plaintiff it appears paid six hundred pounds cash towards the purchase of the vessel, and was afterwards very successful at the seal-fishery, and that to suit the defendants purposes and at their desire, their proceedings terminated by the plaintiff going elsewhere, and giving defendants the notes referred to for the sum of leaving as the plaintiff says, the accounts open for adjustment. It was for the jury to say if they had been finally settled or not. If such was not the case, there was nothing to debar the plaintiff seeking his rights and recovering any amount if there were any which he was overcharged or short-credited.

With regard to the charge of interest made by the defendants, the Court were clearly of opinion that as the parties had dissolved before the end of the year 1858, they could not, under the agreement, set that off against any claim in this action.

Here his Lordship referred to the evidence and pointed out some errors which had been mistakenly made by the plaintiff in his claim and which he directed the jury to cast from their consideration.

As to the remaining items, it was for them to say whether the terms of the agreement had been observed by the defendants—they were to determine whether in the language of the agreement, the plaintiff had been credited on the one hand, and debited on the other, with St. John's customary dealing prices, and they would for that purpose take neither the highest nor the lowest prices which were given and paid at the time of the various transactions.

Here his Lordship referred to the conflicting evidence as to the price of seals which formed a large item £45 of the plaintiffs present claim of £157 8s. 1d., the plaintiff claiming 30s. as the price current at the time of the sale of his cargo, while the defendants had credited 29s.

The question for the jury was—had there been a final adjustment—if so, the defendants were entitled to their verdict. If they were not satisfied of this, they would, putting the claim of interest out of the question—say whether the terms of the agreement as to prices had been observed by the defendants—if so, the defendants would be entitled to their verdict, if not, and the plaintiff had been short-credited or overcharged, they were the judges of the amount and would give their verdict accordingly.

The jury retired and at about 11 o'clock, p. m., returned a verdict for the plaintiff for £86 5s. 4d.

Mr. Pinsent and *Mr. A. Emerson* for plaintiff.

Hon. Attorney General and *Mr. Hoyles* for defendant.

1859, *January*. HON. MR. JUSTICE ROBINSON.

Arbitration—Submission by consent of parties—Award—Setting aside of where arbitrators having appointed umpire make their award without notice to parties, and on evidence taken before umpire was appointed.

Where the plaintiff sued the defendant for an assault on his wife, and afterwards the parties referred the matter to the arbitrament of two arbitrators, with power to appoint a third in case they should differ, the reference being made under a cognovit which contained an undertaking on the part of the defendant "that he would not bring any suit of error, file any bill in equity, or do any matter or thing to delay the plaintiff in entering up judgment and suing out execution." The two arbitrators entered on the arbitration, were attended by counsel, and heard witnesses, and differing, appointed an umpire, and made a unanimous award for plaintiff. No counsel or witnesses were heard before the umpire nor was any notice given to the defendant. The plaintiff obtained a rule to set aside award on the ground that the umpire, or third arbitrator, had not examined the witnesses himself or heard the parties.

Held—The defendant was precluded by his cognovit from availing of the benefit of any objection which he might take, unless he could establish fraud.

IN this cause Mr. Carter, Q. C., obtained from me on the 9th December a summons calling upon the plaintiff to shew cause why there should not be a stay of proceedings until a motion could be made to the court to set aside the award made in this cause and the judgment entered up thereupon, on the grounds that a third arbitrator appointed by the two arbitrators named by the parties had not examined the witnesses himself or heard the parties, to which summons Mr. Pinsent shewed cause on the 21st.

It appears that the plaintiffs sued the defendant for an assault upon the plaintiff's wife, alleging, as special damages, that she was then pregnant, and mis-carried in consequence of the assault. As the case was coming on to trial in the last term, it was referred by the parties to the arbitrament of Thomas Bennett and John V. Nugent, Esquires, with power to them, in case they should differ, to appoint a third arbitrator, the award of whom or of any two of them to be final. This reference was made under a cognovit and rule of Court, and in the cognovit was an undertaking by the defendant "that he would not bring any writ of error, file any bill in Equity, or do any matter or thing to delay the plaintiff in entering up judgment and suing out execution."

It further appears that Messrs. Bennett and Nugent entered upon the arbitration, were attended by counsel for both parties,

and examined several witnesses, and differing, they appointed as third arbitrator Mr. Morry, and on the 25th Nov. all three concurred in an award for the plaintiff of £50 sterling; but, it also appears that no counsel or witnesses, or the parties, appeared, or were required to appear, before such third arbitrator, and that he gave his award upon the evidence taken by the other two arbitrators, for which reasons Mr Carter and his client believe that the defendant has been prejudiced, and they seek to set the award aside. Mr. Carter admits that he cannot impute bad faith or corruption to any one in the matter, and that Mr. Bennett had casually, in the police office, mentioned to him that Mr. Morry had been appointed as third arbitrator. I do not attach undue weight to a communication made so informally, and I think Mr. Carter might reasonably have suspected that a notification of the appointment of the third arbitrator should have been formally served upon him, and that the three arbitrators should have met and summoned the parties before them. The defendant relied on the judgment of the Supreme Court, delivered in 1852, in the matter of the arbitration between the *Caledonia* and *Kingaloch*, in which an award was set aside under circumstances in some respects very similar to those in the present case, but differing in two important points: 1st, that in that case the reference was made under a bond without any undertaking to waive error: and 2nd, the party there complaining had expressly required the newly-appointed arbitrator to hear him and his witnesses before making his award, which he neglected to do. Also, in the case *re Salkeld vs. Stator*, 12 Ad. & E., 767, referred to in the judgment and cited by Mr. Carter, there was an express demand to be heard before the third arbitrator, which was neglected; here there was not any demand made to be heard by or a tender of any witnesses to the third arbitrator—possibly because the defendant had not been formally notified of his appointment; and I think the three arbitrators ought to have held a regular meeting and summoned before them the parties, and, if required, the witnesses, and their neglect to do so would be considered by the court an irregularity, and, in the case of a bond, probably would induce it to set aside the award; but the defendant's undertaking in his cognovit varies his position; and would preclude him from having the benefit of the objections he now raises, unless there was fraud, which is not imputed, or unless it were clearly shown by facts that some palpable injustice had actually been done, which has not been shewn here.

In *Best vs. Gomperty*, 2 C. & M., 427, and in *Brown vs. Lord Granville*, 2 Dow, 726, a defendant was precluded by a similar undertaking in a cognovit from taking advantage of error apparent on the face of the record. In *Hull vs. Lawrence*, 4 S. R., 589, and in *re Turner*, 5 B & Ad., 488, it was ruled that an umpire may receive the evidence from the arbitrators, and need not examine the witnesses himself, if no objection be made by either party. In *re James*, 2 N. & M., 328, an umpire made his award without examining the witnesses himself or hearing the parties, and his award was upheld against a party who, knowing his appointment, made no application to him to hear further evidence; and in *Hewett vs. Laycock*, 276, the exclusion of the defendant's attorney, if not done corruptly, would not invalidate an award; Lord Tenterden says, "as to the exclusion complained of, I think it right in my situation to say that, when parties refer to a private tribunal, the mode of conducting the enquiry must be left to the arbitrators, and there may be circumstances in which it is important to exclude attorneys—there is less reason certainly for excluding the parties themselves, but where both parties are excluded, there is no reason of complaint."

Considering the authorities above cited, I must hold that the award is not void, and, looking at the plaintiffs' case as disclosed in his declaration—at the award concurred in by the three arbitrators, at the absence of all corrupt motives—I can find no substantial reason given or fact sworn to to lead my mind to doubt the justice of such award, and, giving to the undertaking of the defendant in his cognovit its fair and legal effect, I think he is precluded from excepting to the irregularities complained of, and I must refuse a stay of proceeding and discharge my two summonses, but without cost.

Mr. Pinsent for plaintiff.

Mr. F. B. T. Carter for defendant.

1859, *January*. BY THE COURT.

Practice—Appeal to Privy Council—Action indirectly involving £500, right to appeal—Terms upon which appeal is granted.

Where the action was against the defendant for his proportion of the insurance, on a vessel insured in a mutual insurance club, the whole insurance being for £900, the Court were of opinion it gave the right of appeal to the Privy Council, as £500 was involved.

Mr. Hoyles, for defendant, moved on petition setting out that the action indirectly involved over £500, for leave to appeal to the judicial committee of the Privy Council. Mr. Carter shewed cause, and contended that the then action was simply for the recovery of defendant's proportion, and that in any case it did not appear that a sum sufficient to permit the appeal (*viz.* : £500) was involved, as many of the underwriters might be willing to pay, or might for aught the Court knew, have already arranged.

By the Court.—The petitioner has made out a *prima facie* case, according to the terms of the charter. We know judicially, from the proceedings had before us, that the action does involve over £900, it is for the plaintiff to rebut that by proving such facts as he contends might arise. We think the petitioner is entitled to appeal, on the terms that he pay the judgment and costs, and give sufficient security to respond the costs of the appeal in case the judgment of the Court was sustained, the plaintiff also giving security to refund in case the appeal be adverse to him.

Mr. F. B. T. Carter for plaintiff.

Mr. Hoyles for defendant.

1859, *January*. HON. P. F. LITTLE, ACT'G C. J.

Contract—Agreement for purchase of seals with "the rise"—Construction.

The plaintiff agreed to sell all seals brought in during the spring to defendant at prices per cwt. agreed on, and in addition "the rise" that would be paid by five firms named in the agreement. In an action to recover the amount of "the rise" the jury found a special verdict that 30s. was the highest price paid by any one of the five firms, and that 27s. 6d. was the lowest average price paid. Upon a rule, upon which the construction of the agreement was argued, the plaintiff contended he was entitled to the highest price or "rise" paid by any one of the five firms, and the defendant that he was only liable for the lowest price or "rise" given and concurred in by all.

Held—The construction of neither party was correct. The plaintiff was entitled to recover the average "rise" given by all the five firms, together with any advances they may have paid their planters. In arriving at this conclusion the five firms have to be read copulatively not disjunctively.

THIS was an action of assumpsit brought to recover the sum of £1,070 17s. 6d., being the rise money upon a large quantity of seals sold by plaintiff to defendant in the Spring of 1858. The plaintiff carried on extensive mercantile business in Harbor Grace, and in the Spring of 1858, having no accommodation for the manufacture of oil, his premises having been previously destroyed by fire, he sold all his seals to the defendant, an American gentleman, who was manufacturing oil in Saint John's, upon the terms set forth in the following agreement.

ST. JOHN'S, Nfld., April 15th, 1858.

Sold to Messrs. Gilbert, and Thomas Kearns, jr., of Boston, all the seals that may be brought in the Spring by the vessels supplied by Puntun and Munn, at the following rates, viz.: For young harp seals, twenty-five shillings; young hoods and bedlamers, twenty-three shillings, old harps twenty-one shillings; and old hood seals at nineteen shillings per cwt., with the rise if any that may be paid (by Messrs. Baine, Johnston and Co., Messrs. J. & W. Stewart, Messrs. McBride & Kerr, Messrs. Bowring Brothers, Messrs. Job Brothers & Co.) as well as any advances the said houses may pay their planters over and above the said sum of twenty-five shillings, and the rise on each denomination up to the 20th May next. The vessels to take their turns in discharging according to the order of their arrival, payment to be made in cash on the delivery of each cargo. The tare to be deducted as follows: on young harps, one and one half pound; on young hoods, two and one-

half pounds; on bedlamers, five pounds; old harps and hoods, either to be fleshed or subject to the usual tare of sixteen lbs. for the former, and eighteen lbs. for the latter.

The usual practice of the town to be observed in regard to cats or merchantable seals.

(Signed), PUNTON & MUNN.

Under this agreement the plaintiff claimed as rise the highest price given by any or either of the houses. The first payment was made at 25s. a cwt. and a rise of 5s. per cwt. having been given by one of the houses referred to in the agreement, the plaintiff claimed the benefit of the full rise of 5s. The defendant paid 2s. 6d. rise money, that being as he alleged the rise which the majority of the houses referred to gave.

The following witnesses were then called for the plaintiff.

Pierce Feehan: Sold seals to McBride & Kerr, and was credited in his account 30s. a cwt.; he is in credit with McBride's house.

John Bowring purchased seals from John Silvey under an agreement that he should pay the same price that Cummins got for his seals; gave him 30s.; the rise money paid to all the crews was 27s., that is 2s. above the first payment, except to Silvey's crew, who got 28s.; Silvey's crew were paid 28s. to avoid litigation. It is the usage to credit planters who leave their money in the merchant's hands 1s. or so above the actual rise.

Richard O'Dwyer purchased seals from Peter Cummins at 30s. per cwt. cash on delivery

Peter Cummins: Sold seals under agreement to Richard O'Dwyer for 30s., got no advance above the 30s.

Pierce Barron: Sold seals to Baine, Johnston & Co., was paid 25s. a cwt., afterwards 29s. for young harps.

Stephen Rendell: Purchased seals for 27s. to 20th May, gave independent planters 28s.

Joseph Yelland, book-keeper at Bowring Brothers, said that 28s. was given by their house to the crew of the *Fanny Bloomer*, who had entered an action against the firm, all other crews got only 27s.

Robert Alexander: J. & W. Stewart's house paid crews 27s. including rise, and 28s. to planters.

James Goodfellow: McBride & Kerr paid 27s. to 20th May. Feehan got 30s., he was to get what Whelan got, who also got 30s., other planters were allowed 28s. 6d.

Mr. Hoyles, for defendant, contended that defendant was only liable for the average price given to crews which was 27s. 6d., or 2s. rise money, and the average given to planters which was 27s. 6d. or 2s. 6d. rise, which amount had already been paid.

Hon. Judge Robinson charged the jury, and after reading the evidence and agreement, told them that the plaintiff under the agreement, was not entitled to the highest price either of the houses might have given for seals, but he would be entitled to the average rise money paid or payable by their houses to their crews as well as the average sum paid or payable to their planters up to the 20th May. The issue for the jury to dispose of was the average rise over 25s. paid or payable by the houses referred to in the agreement up to the 20th May, and in addition what was the average advances given to planters. Should the jury find that on the whole the average exceeds 27s. 6d., they should find for the plaintiff for so much per cwt above that price they might deem the plaintiff entitled to.

The jury brought in a verdict for 29s. per cwt.

Verdict for £418 3s. 8d. exclusive of £225 paid into Court.

On a subsequent day the points reserved at the trial were argued and the following judgment delivered:—

This action has been brought to recover a balance of £1,070 17s. 6d. claimed by the plaintiffs from the defendants for the rise on a quantity of seals, sold and delivered by the former to the latter in the spring of 1858. The dispute arose out of the construction of the following agreement, viz.:—

ST. JOHN'S, NEWFLD, April 15, 1858.

Sold to Messrs. Gilbert and Thomas Kearns, jr., of Boston, all the seals that may be brought in this spring by the vessels supplied by Puntun and Munn at the following rates, viz.: for young harp seals, 25s.; young hoods and bedlamers, 23s.; old harps, 20s.; and, old harp seals at 19s. per cwt., with the rise, if any, that may be paid by Messrs. Baine, Johnston & Co., Messrs. J. & W. Stewart, Messrs. McBride & Kerr, Messrs. Bowring Brothers and Messrs. Job Brothers & Co., as well as any advances the said houses may pay their planters over and above the said sum of 25s. and the rise on each named denomination up to the 20th May next. The vessels to take their turn, &c.; payment to be made in cash on delivery of each cargo; the tare, &c.

(Signed),

PUNTON & MUNN.

Upon the trial a bought note similar to the foregoing was put in evidence. Under this agreement the plaintiffs claimed "the rise" or highest price paid by any one of the five houses named therein, as well as any advances any of them paid any of their planters above the rise, at the rate at which the defendants were bound to pay them thereunder. On the other hand, the defendants contended that according to the strict and literal interpretation of the agreement, they were only bound to pay "the rise" or price which all the five named houses actually paid for the seals purchased by them with the advances allowed to their planters. Under this direction of the court, the jury who tried the cause were required to ascertain what was the highest price paid by any of the said five houses for seals purchased last spring, taking into account the advances to their planters; and secondly, what was the average price paid by the five houses, taking them together. The jury found by a special verdict that 30s. per cwt. was the highest price and 27s. 6d. per cwt. the lowest average price, subject to the opinion of the Court as to which rate should be allowed upon our construction of the agreement. Having heard the argument of the learned counsels on both sides, it is our duty to express the opinion we have formed on the case, after a careful consideration of the merits, as they were presented in evidence.

The plaintiffs are highly respectable merchants carrying on an extensive trade in Harbor Grace, and, as it appeared in evidence, their mercantile premises having been accidentally destroyed by fire last spring, they could not conveniently manufacture their seals, and, coming to St. John's, entered into this agreement with the defendants for the sale of the whole of the seals which should be brought in by the vessels supplied by them. The defendants are gentlemen residing in Boston, in the United States, and came into this market to purchase and manufacture seals on their own account. It was not denied that the plaintiffs were independent vendors, who from their position had a right to expect at least as high a price for their seals as should be obtained by any other sellers in the market. If instead of binding themselves to deliver all their seals to the defendants, they had sold them to different parties, it would be unreasonable to assume that they could not have obtained as fair a price as Captain Cummins, Captain Feehan, Captain Silvey, and others, who were proven to have got 30s. per cwt. for their young harp seals. The defendants had the advantage of obliging the plaintiffs to deliver to them all their

seals, and they now assert that they did not agree to give the plaintiffs the highest market price paid in St. John's, but the price that should be paid by the five respectable houses named. Now, what was the honest intention of the parties to this agreement? If the highest price given in St. John's had been mentioned there would have been no difficulty in the case.—Was it really intended that the plaintiffs should have the next best mode of affixing the value to their goods in limiting "the rise" to the highest price that should be given by any one of the five named houses? There is much force in this view, looking to all the circumstances. The defendants would thus obtain whatever advantage there may be in the limitation to the five houses contracted with, a stipulation for the highest market price which would be an unlimited reference to all purchasers of seals in the market. The plaintiffs, therefore, assert that under a fair construction of the agreement they are entitled to be paid at that rate—that if one of the five houses paid a rise of 2s. per cwt, another 6d. more, a third 6d. more, a fourth 6d. more, and the fifth 1s. 6d. more than the fourth, they claim the benefit of that—thus making 5s. per cwt. as the rise above the 25s. for young harps, being the highest paid by any of the five. But the defendants reply that as all these houses did not concur in paying the rise of 5s. per cwt. allowed by one or two houses, or 3s. allowed by another, therefore, what one, two, three, or four of them paid is not what defendants are bound to pay, but only what the price concurred in paying, which simply means the lowest price paid by any of them. By this mode of reasoning, if any one of the houses had given no rise over the 25s., or through such an accident as befel the plaintiff's premises, had not purchased and manufactured any seals last spring, the defendants would not in any such contingency be liable for any rise over the stipulated rates, which is certainly an unreasonable interpretation of the intention of the parties.

In *2 Addison on Contracts*, p. 965, Horbart, C. I., observes, "that every deed ought to be construed according to the intention of the parties, and the intent ought to be adjudged of the several parts of a deed as a general issue out of the evidence, and ought to be picked out of every part, and not out of one word only"; and the author says "such a construction ought to be put on particular words as will best answer and effectuate the apparent general intention. The terms of the contract are to be understood in their plain, ordinary and popular sense,

unless they have generally, in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense, distinct from the popular sense of the same words, and the ordinary grammatical construction is to be followed, unless it is repugnant to the general context of the written instrument."—*Elliot vs. Turner*, 2 C. B., 446; *Roberson vs. French*, 4 East, 137, 6 sc., N. R. 683; and in page 966, "To enable us also to arrive at the real intention of the parties and to make a correct application of the words and language of the contract to the subject matter thereof, and the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration. The law does not deny to the reader the same light and information that the writer enjoyed, and he is entitled to place himself in the same situation as the party who made the contract, and so judge of the meaning of the words and of the corrupt application of the language professed to be described. Many words in our language are susceptible of various meanings, according to the subject-matter to which they are applied or the situation of the parties by whom they are used, and they should consequently be construed *secundum subjectum materiem*"; and in p. 978, "evidence of general usage in the trade to which the contract refers is admissible to give a particular and peculiar sense to the words employed, as the parties may be presumed to have contracted in conformity with the custom and to have used the words in their customary trade acceptation. If there are peculiar expressions used in a contract which have in particular places or trades a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the Court to decide what the meaning of the contract was."—*Hutchinson vs. M. & W.*, 542.

Now, looking at the agreement by a regard to these authorities and at the case as it came before the Court upon the evidence adduced on the trial, we feel that we cannot assent to the construction contended for by either of the parties, and, while we dissent from the defendant's, we conceive the plaintiff's view much more reasonable and perhaps accordant with what may have been the real intention, though not clearly expressed, of the contracting parties. But we are bound to gather that intention from the agreement and the surrounding circumstances laid before us. Neither the plaintiff nor the defendant were examined; we do not know that their testimony could have assisted us, but we cannot supply words or evidence. If

the plaintiffs desired to give evidence of any peculiar meaning attached by the trade in this colony to the term "*rise*," used as it is in contracts like the present, we did not decide that it was not competent for them to have done so without saying that such evidence would have helped them or not.

As the matter stands, then, we are of opinion that upon a fair construction of the agreement the plaintiffs are entitled to recover the average "*rise*" or increase of price paid by all the five houses therein named, together with any advances they may have paid their planters. The enumeration of them we read, not disjunctively, but copulatively, in arriving at this conclusion. If we could read them distributively, the sense would be different, but we cannot do so consistently with the wording of the document and the proper application of the language to the subject matter of the contract. We, therefore, think there should be a new trial, as we are not satisfied with the accuracy of the average of 27s. 6d. per cwt. found by the jury. It is not consistent with the evidence, and we have not the power to bind the parties to our opinion of the correct average, as that is a matter of fact and calculation peculiarly within the province of the jury. We may, however, state that that is less than we make it from our notes. Although it is now not necessary that we should state our opinion on the exception taken to the admission of Silvey's agreement, my brother judges and I have no doubt that we were justified in admitting it in evidence—Messrs. Bowring, one of the referred houses, having thereby agreed to pay Silvey the same price Mr. O'Dwyer agreed to pay Cummins, which was 30s. per cwt.; that agreement was in effect the same as if Bowrings had told Silvey they should pay him 30s. per cwt. for his seals.

Mr. Carter for plaintiff.

Mr. Hoyles, Q. C., for defendant.

1859, January. HON. MR. JUSTICE ROBINSON.

Practice—Rule nisi to set aside verdict—Verdict contrary to evidence—Misdirection—action against sheriff for damage to property attached by him and whilst in his custody.

In an action against a sheriff to recover damages alleged to have been sustained by the plaintiff in consequence of a hawser belonging to him and attached by the sheriff having been injured by rats whilst in the sheriff's custody, the jury found for the plaintiff. On a rule nisi to have the verdict set aside as contrary to evidence—

Held—(Making the rule absolute)—In respect to property in the custody of the sheriff, he is only liable when the injury complained of to the goods attached arises from his culpable neglect or fraud either by himself or his officers. He is not responsible for the destruction of property by rats if he has used ordinary precaution to guard against the damage.

THIS was an action on the case for the recovery of the value of a warp or hawser of the plaintiff which had been taken under an attachment by defendant, Sheriff of the Central District and stored in a broker's store in St. John's, but upon delivery to plaintiff was found to be destroyed or rendered useless by rats. The plaintiff charged negligence against the sheriff for want of ordinary care in the storage of this attached property, and sought to recover £27, which he alleged the warp was worth. The plaintiff's declaration alleged that the defendant, to wit, on the 1st August, 1858, at St. John's, under and by virtue of a writ of attachment of Our Lady the Queen, issuing out of the Central Circuit Court against the plaintiff at the suit of one Thomas Foster, directed to the Sheriff of the Central District of Newfoundland, he, the said defendant then being such sheriff, attached, took, and carried away out of the possession of the plaintiff a certain hawser of the plaintiff, to wit, of the value of £50, and thereupon it then became and was the duty of the defendant to take due and proper care of the said hawser while the same was in his possession under the said writ, and although the plaintiff then and there gave security to the defendant, as required by law, to answer the said writ, and the said hawser was thereupon afterwards, to wit, on the 1st February, 1859, restored by the defendant to the plaintiff; yet the defendant not regarding his duty in that behalf, but contriving to injure the plaintiff therein while the said hawser was in the possession of the defendant, as aforesaid, to wit, on the 1st day of Dec, 1858, at St. John's, aforesaid, took so little and such bad care of the said hawser and so negligently

and carelessly conducted himself with respect to the same that the same then and there became and was damaged, spoiled, and totally lost to the plaintiff—to the plaintiff's damage of £50.

Donald McDonald, plaintiff, proved the issuing of the attachment against him by Foster, under which the warp was seized; when seized a new warp, when returned to him it was perfectly useless, having been nibbled and cut by rats.

Cross-examined—After giving security, I got order from Sheriff's bailiff on Mr. Hearn, in whose store warp was, to get it; he told me I should pay storage; Hearn wanted 20s. for storage; I refused to pay it; got first order in December, I lost the order, and in February got another order. Hearn refused to deliver warp without sheriff's order; when I got the order he gave it up to me.

W. Blakler knew warp to be a good one before it was attached; saw it afterwards, it was then useless, being cut and nibbled.

Richard English corroborated last witness.

John Chidley was sent to Hearn's for warp, took it away on a catamaran, the store was not a fit place for the warp.

William Pitts surveyed warp, very much cut, the strands knawed off and nibbled, the warp was valueless.

John Hackett was present at survey, the warp was cut and useless.

Defence.—That ordinary care was used in storing the warp. It was placed in the store of Mr. Hearn, where articles of a like description, together with articles of provisions, are stored, and the defendant being guilty of no neglect, was not liable for any injury to the warp. That defendant, having neglected to take possession of the warp when he got his order upon Hearn for it, it lay in the store after that period at plaintiff's own risk, and the injuries (if any) complained of were occasioned subsequently to the defendant giving the order, after which he ceased to be liable.

John R. Jeans, after plaintiff had given security in Foster's case, I gave him an order on Hearn for the warp. I gave him four orders altogether, the first on 8th Nov., the second on the 2nd Dec, the third on the 17th Feb., and the fourth on the 27th Feb. When I gave him the last he said he had lost all the previous ones—they were all unconditional orders. Hearn's store is a proper place to keep articles of this description, the Sheriff has there now nearly £1000 worth of property, consisting of provisions, cordage, &c.

Cross-examined.—On giving the first order I mentioned something about storage; there was nothing about storage in the order—had plaintiff presented first order he would have got the warp; the warp was not on the floor of the store, but supported by empty barrels; when the warp was first taken noticed it being very much chafed as if by the ice, there were cats in the store.

Patrick Hearn spoke as to the store being a fit place for storing cordage, a very large quantity of provisions and cordage in same store; took as much care of warp as if it were his own property. Never said anything to plaintiff about paying for storage; never refused to give up warp to him when he presented the Sheriff's order, I gave it up immediately; keeps cordage of his own in same store; has had 115 coils of cordage there for the past nine months.

Mr. Hoyles closed to the jury.

The acting Chief Justice, after reading and commenting upon the evidence, told the jury that the Sheriff was bound for ordinary care; what that is would of course depend upon the nature of the property, and the place where it may be lodged. If they find the Sheriff did take ordinary care of this warp, or if they believe the warp was injured after the first unconditional order for delivery was given, they would find a verdict for the defendant; otherwise they would give the plaintiff such damages as they considered him fairly entitled to. Verdict for the plaintiff £10 cy.

The Attorney General subsequently obtained a rule *nisi* for new trial upon the ground of the verdict being contrary to the weight of evidence.

On a subsequent day the following judgment was delivered :

Rule *nisi* to set aside verdict obtained by the plaintiff on the ground, 1st. of misdirection by the judge who tried the cause; 2nd, that the verdict was contrary to evidence. The case was tried in the Central Circuit Court, and the rule *nisi* was returnable into this Court. Mr. Hoyles, Q. C., for the plaintiff, shewed cause to the rule, which the Attorney General supported on the 28th May.

On this day judgment was delivered by Mr. Justice Robinson. This was an action brought against the defendant as Sheriff to recover damages alleged to be sustained by the plaintiff in consequence of a hawser belonging to him which was at-

tached by the Sheriff, having been injured by rats when in the store of Messrs. Hearn, and in custody of the Sheriff at suit of one Poster.

The learned acting Chief Justice charged the jury that the Sheriff would be responsible, if in the discharge of his duty he should be guilty of actual negligence, or have neglected to take "ordinary" care in the custody of the goods placed in his charge; and both counsel have, in the argument, conceded the correctness of that ruling, and we think that there was no misdirection. On the second ground we are all of opinion that the verdict is not supported by the evidence, and although it is not usual to disturb a verdict which is for an amount so small as the present, £10 cy., yet the principle involved in this case is important. The Sheriff is *bound* to attach property; in keeping it he must use ordinary care. There is no evidence to sustain a charge of actual negligence or culpable neglect; but the defendant is sought to be held responsible, as of course, because a damage has arisen by rats in a store where it was proved similar goods were and are safely lodged, and where the precaution of cats being kept, was used. If under such evidence a Sheriff would be responsible, his position would be anomalous, and it is difficult to know how he could act with safety to himself in any case. In *Story on Bailments*, p. 629, it is laid down, "In respect to property in the custody of the officers of the court pending process and proceedings, such officers are undoubtedly responsible for good faith and reasonable diligence, but they are not liable as of course, because there has been loss by embezzlement or theft. In order to charge them in such cases, the loss must have arisen from the culpable neglect or fraud either of themselves or of the agents or servants employed by them. And it seems that the court places such confidence in its officers that it will require some proof at least of negligence or fraud in them or their subordinates before it will throw the burden of proof upon them to exonerate themselves from the charge—the degree of diligence which officers of the court are bound to exert in the custody of the property, seems to be such ordinary diligence as belongs to a prudent and honest discharge of their duties."

In *Cailiff v. Danvers*, Pealle, R. 144; *Moore v. Morgan & Co.*, R. 479, and *Abbott on Shipping*, it is laid down, "that a warehouseman is not responsible for the destruction of goods deposited for hire, by rats or mice, if he has used the ordinary precautions to guard against the loss."

The rule must therefore be made absolute for a new trial, the costs to abide the event.

Mr. Hoyles, Q. C., for plaintiff.

Hon Attorney General for defendant.

MARISTANY Y ELIAS v. O'BRIEN AND GRIEVE.

1859, *January*. HON. SIR F. BRADY, C. J.

Practice—Rule nisi—New trial—Trespass—False imprisonment—Commission to enquire into causes of wreck—Powers of commissioners to arrest parties who refuse to attend before them as witnesses.

Where the plaintiff's vessel had been wrecked on the coast of Newfoundland, and the resident magistrate had been charged with misconduct in reference to the same, and a commission consisting of the defendants and others had been appointed by the Governor in Council to enquire into the same, it appeared that on the refusal of the plaintiff to appear before the commissioners, the defendants, both of whom were justices of the peace, had issued their warrant and had the plaintiff arrested and detained for some hours under arrest.

In an action for false imprisonment the jury found for the plaintiff. On a rule *nisi* to set aside the verdict,

Held—(discharging the rule.)—The commission afforded no justification to the defendants for arrest and imprisonment. The fact of the commissioners who signed the warrant being justices of the peace is no answer, the warrant was signed not as justices of the peace with any criminal prosecution before them, but as commissioners.

Mr. Pinsent opened the case to the jury, and after detailing the circumstances which gave rise to the action, said that they were empannelled to try a case involving considerations of a most serious and important character, a case which involved a violent infraction of the liberty of the subject in an attempt to revive a mode of procedure bearing a strong resemblance to the illegal and oppressive arrests for which the ancient courts of Star Chamber and High Commission were at once so famous and so odious. It appears that the vessel *Plata*, of which the plaintiff was commander, having in the month of January, 1858, been wrecked at Trepassey, having on board a large amount in specie, circumstances of alleged robbery and plunder in which the magistrate, Mr. George Simms, was said to be implicated, led the local government to set on foot an inquiry into the con-

duct of that officer, and for the purposes of that inquiry to appoint the defendants, in connection with Mr. Ambrose Shea, the Speaker of the House of Assembly, and Mr. Robert Prowse, the Vice-Consul for Prussia, as commissioners, to enquire into the facts. These gentlemen appeared to consider the evidence of the plaintiff necessary to the investigation, and accordingly summoned him to appear before them to give his testimony. This he did not consider himself warranted in doing, and refused to obey the summons of a tribunal whose authority he did not recognise, and who had no jurisdiction over his private rights, and could afford him no redress. The commissioners then undertook in the manner he (the learned counsel) had already described to order and effect the arrest of the plaintiff, that arrest being directed by the present defendants, who, because they claimed to hold commissions as justices of the peace, assumed, while acting in a different capacity, having no judicial powers to possess the right to arrest any persons who in their judgment might be necessary to the investigation they were appointed to make. This proceeding he had authority for making without fear of contradiction, was advised by the law officers of the Crown, who were the substantial defendants in the case. There was nothing that the law had a greater abhorrence of than the erection of new tribunals. A court possessed of judicial powers, empowered to exercise authority over the liberty of the subject, could exist only by virtue of the common law or express statute. The Queen of England herself had no more power than the meanest of her subjects to convey the right to any individual or association of persons to exercise the authority claimed in the present instance by the defendants, how much less then could the local executive or the law officers of the colony. There was nothing of which the constitution under which we lived was more jealous than the slightest infraction contrary to law of personal freedom. It was that sacred spirit of liberty which denounced the illegal and obnoxious tribunals to which he had referred, which abolished them by express statute, and set up the Habeas Corpus Act for the protection of the subject. These protecting principles, well styled the bulwarks of our liberty, were the inherent right of every Briton, no matter how far he might be removed from the parent state, and were equally possessed by the foreigner, nay, the slave himself, the moment he put foot on British soil. He (Mr. Pinsent) could not for a moment suppose that such learned

and distinguished gentlemen as the Attorney General and Solicitor General of this colony could be ignorant of those principles which were the distinguished features of that constitution which was elevated above all others, and which in this country we possessed, not simply as being under the dominion of the British Crown, but still more forcibly as possessing that responsible system, the concession of which we ought to be proud of, and at the same time to be careful to use aright. Ignorance of the law was no plea for the humblest and most illiterate, how much less then could it avail in the case of the highest legal functionaries of the state, this illegal proceeding, this reckless abandonment of the most valued principles of our law must have been the result of design to suit the purposes of the moment. Contemplate it in whichever light they would, they were bound to render an exemplary verdict, not alone to compensate the plaintiff for the wrong which had been done him, but as a warning example for the future and a guarantee of security to that public whose dearest interests it was their solemn duty to conserve. Of little avail would be the great landmarks and grand principles of the constitution unless there were some appeal from the illegal and oppressive conduct of those in whom were vested power and authority; that appeal lay to an honest and intelligent British jury who without fear, favor or affection would perform that duty the faithful execution of which made them the great palladium of our liberties. Would not such a jury in either of the old countries say that £500 fell short of the verdict they should render? The question of damages was one for them, and he (the learned counsel) would beg of them never to allow it to be said that they refused to a foreigner that redress which they would not hesitate to give to a fellow-citizen of their own, that foreigner, too, the subject of a nation with which, in a commercial point of view, Newfoundland had such intimate and profitable connection. They would in arriving at their verdict not alone consider that the plaintiff's home had been invaded by policemen, and that he had been dragged like a criminal through the streets and kept under arrest for some hours, but they would vindicate the violated law and destroy in its inception a principle which from the curtailment of personal liberty, would lead with impunity to the endangerment of their properties and their lives.

(Here the plaintiff's evidence, taken under examination, was put in and read, deposing as to the service of summonses upon

him; his subsequent arrest by policemen; his being brought before the commissioners, and on refusing to be sworn, being confined for some hours.)

The notices of action, &c., were here admitted in evidence; after which,

R. R. Lilly, Esq., was called and deposed to the main facts of the plaintiff's testimony as to the circumstances of the arrest and detention. About four o'clock on that day Mr. Grieve gave Chancey, police sergeant, a note for plaintiff's release; plaintiff was arrested under warrant, signed by defendants, as justices of the peace; plaintiff was detained in the room where the commission was sitting for half an hour, and then sent into another room. I left the building at four o'clock; plaintiff was given into the custody of Chancey.

Cross-examined.—He was directed to take him as prisoner, no time specified, a verbal direction was given while commitment was making out. Plaintiff was brought up at half-past one o'clock, that was the time the commission met; cannot say when he left; I left a memorandum, signed by Mr. Grieve, for his release at four o'clock; plaintiff was in the Judges' Chambers, the Hon. L. O'Brien, Mr. Grieve, Mr. Shea, and Mr. Prowse were commissioners, they were to inquire into certain matters connected with the wreck of the Spanish vessel *Plata*. The charges were set forth in a letter from the Spanish Consul to His Excellency the Governor. Plaintiff was wanted to give evidence, a summons was sent for his appearance; the defendants were justices, and acted as such. Plaintiff would not come, and a second summons issued, then a warrant for his apprehension on an affidavit of John Devereux, that he was a material witness, and upon the affidavit of Chancey, stating that plaintiff had been served with a copy of the summons. The warrant was signed by the defendants. Mr. Woodley Prowse was Spanish interpreter to the commission, and plaintiff refused to be sworn; commissioners went on to do their business without him. Mr. Hoyles then produced documents connected with the case.

Mr. Carter objected to their admission as evidence under the general issue. Objection to be raised when motion made for reading.

Mr. Lilly continued—Did not see plaintiff in the Judges' Chamber; was directed to go to Mr. Grieve by Attorney General.

Re-examined.—Commission opened on the 25th. Mr. Grieve, Mr. O'Brien, and Mr. Prowse were present. I was appointed as secretary. On the 26th, 27th, and 28th the commissioners sat; did not see any deposition of any crimes committed, nor any to lay the foundation of the proceedings: defendants acted as commissioners throughout, except in issuing the summonses and warrants and the commitment, the other two did not act. All the witnesses were sworn by Mr. O'Brien; all the commissioners took part; the defendants are justices of the peace; cannot say if sworn. *Dedimus* produced; by it they do not appear to be sworn.

Mr. Hoyles then addressed the jury for the defendants. After all the Spaniard's fondness for constitutional principles, he wanted a little money; he asked for heavy damages, but before they could undertake to give him damages to any amount, they should be satisfied that he was entitled to them. True it was that if a man's rights were infringed at all he was entitled to damages of some sort, the amount was another question regulated by circumstances. If a person passing along the street were jostled by another or his toes were trodden upon, that person's legal rights would be infringed by the mere pressure; and seeing how often our legal rights were infringed in this way, there must be a great deal of forbearance in the world or actions would be much more numerous. Has the plaintiff had his rights infringed? His learned counsel says he is entitled to the rights of a British subject and should not be arrested or detained for any period of time against his will. The right to arrest in this case is in a great measure a question of law, and in some degree of fact. In this case a commission, under the great seal, was sitting, necessarily requiring the presence and authority of justices of the peace for the purposes of their investigation set in motion by the plaintiff. It arose out of the loss of the plaintiff's own vessel, and was appointed for his own benefit, to get for him (as the courts were not sitting at the time) a ready means of inquiry and redress if he had any just complaint. The plaintiff, whose evidence was the principal in the matter, was requested to come, was, when he refused, twice summoned; he still refused to come. A deposition is made out that he is a material witness, then a warrant is issued in the regular and usual form; he is brought up and refuses to give evidence, and is consequently confined for a short time until the commissioners terminated the sittings of the day. We

contend that as magistrates they had the right to adopt these proceedings. Assuming on the other hand that they had not that power, what damage has this plaintiff sustained? A very grievous inconvenience, he says. If he had come voluntarily, he would have suffered none. He brings this action because he was compelled to come; he brought it upon himself by his own disgraceful conduct in refusing to give evidence before a commission specially appointed at his own instance for his own benefit. He is not dragged through the street, he is simply accompanied by the policemen, and upon his refusing to be sworn, is placed in a warm, comfortable room in the Court House, where he chats with his friend Mr. Ansell, sits by the fire, and warms himself, and when he intimates that he wants his dinner, has it provided for him, and about four o'clock goes about his business. It was a disgrace for him under the circumstances to come into court with such an action; instead of receiving damages, he ought to be made suffer, if it were possible, for the shameful conduct he had displayed throughout.

Here Mr. Hoyles put in evidence (under objection from the plaintiff's counsel) the commission of defendants as commissioners and justices of the peace, the warrant of commitment, the charges of the Spanish Consul, &c., to show that the defendants were acting as justices of the peace in a regular way.

The Court overruled for the present a line of defence which they were of opinion could not be sustained under the circumstances of this action, but reserved the point upon which, if defendants should succeed in law, they would enter a non-suit.

Mr. Pinsent then closed the case to the jury, after which his lordship charged them; and after stating the nature of the claim, said that from the turn the case had taken, he would not trouble them with many observations. The defendants did not deny the summons, the arrest, and the commitment. He (Chief Justice) had ruled that the circumstances would not justify them in point of law. The circumstances out of which the action arose were known. The plaintiff's vessel was lost at Trepassay, he suffered very considerable loss from the plundering of wreckers; and Mr. Simms, the resident magistrate, was somehow or other charged with such gross misconduct as led to the appointment of the commission to inquire into it. The functions of that commission did not justify them in making an arrest, and for which the jury would give the plaintiff reasonable damages. They were to look calmly, fairly, and

justly at all the circumstances, and say what would be due compensation. There was a matter which went far to mitigate the damages. The commission originated with the plaintiff, and his conduct in refusing to assist them with his evidence went far to deprive him of such damages as he would otherwise be entitled to receive. There was also another matter favorable to the defendants, viz.: the absence of malicious or vindictive motives; and if they believe that the arrest arose out of an error of judgment simply, it would go greatly to control the amount of damages. The term of imprisonment would appear to have been from about one or half-past to four o'clock, when an order was given for his release, of which the plaintiff might have availed. Under all the circumstances, they would say what they would consider fair if one of themselves was arrested, taken through the streets and detained for hours.

The jury retired, and after some time returned a verdict for the plaintiff for £50 stg.

On a subsequent day the following judgment was delivered on a rule for a new trial:

This was an action for an unlawful arrest and false imprisonment, tried at the last term of the Supreme Court, when the plaintiff obtained a verdict for £50 damages. The declaration contained two counts for an assault and false imprisonment, and the only plea before the Court, at the trial, was the plea of "not guilty." I have to regret that I had not at the hearing and determining of the case any assistance, as my brother judges were both concerned in it before their elevation to the bench.

To sustain the action Pedro Maristany y Elias, the plaintiff, was called and proved that he received exhibit A, (the order bearing date the 25th January, 1858), that he did not attend the court because the consul (Spanish) told him not to do so; he further proved that he received exhibit B, (the summons bearing date the 26th January, 1858), and that he did not attend upon it. He then proved that he was arrested by three constables in the Victoria Hotel and brought to the Court House and before the commissioners; that the interpreter presented a book to him and requested him to swear upon it, which he refused to do as the consul was not present. The interpreter then told witness they would imprison him if he did not swear, and he said he would do nothing unless the

consul was there, and he protested against it. That he was then detained until between five and six o'clock, when the constables beckoned to him to leave the room, which he refused to do until the consul came there, and upon that they forced him out of the room and out of the Court House. (Exhibit C & D were then read, also the notices of action to the defendants, and it was admitted that the writ in this cause issued within six months from the date of the arrest and imprisonment complained of). Mr. Lilly was then called and proved the handwriting of both the defendants to exhibits B and C; the two defendants directed Chancey to arrest plaintiff, and that the plaintiff was brought to the room where the commissioners were sitting, by Chancey; that the defendants were justices of the peace; that the plaintiff was detained about half an hour, and was then ordered to be detained and was sent into another room in the custody of Chancey; that a written commitment was afterwards made out; that the plaintiff was brought to the Court House about half-past 1 o'clock. Witness left the Court House at about four o'clock, and did not know how long after he was detained; but witness left a note from Mr. Grieve for his release at that time; he left it with Chancey. He then stated that the four commissioners were engaged to enquire into certain charges against George Simms, Esq., connected with the wreck of the Spanish ship *Plata*, of which the plaintiff was master, and which charges were preferred to the Governor by the Spanish Consul. He then stated the circumstances relating to the summonses and warrant, the arrest of the plaintiff, his refusal to give evidence, and that then the commissioners directed plaintiff to be detained. He also stated that the defendants were acting as justices of the peace in these proceedings; and he proved that John Devereux and Chancey made affidavits, proved the commitment, the Governor's commission, and that the four commissioners were present at the committal of the plaintiff and were acting as commissioners, excepting in signing the summonses, &c. Witness stated that he saw no deposition to found a proceeding but Devereux's affidavit.

Exhibit was as follows: "You are required to attend before the commissioners appointed to inquire into certain charges preferred by the Spanish Consul at Newfoundland against Geo. Simms, Esq., *in his capacity of Justice of the Peace*, at the Court House in St. John's, on Friday, the 26th day of January, inst.,

to give evidence upon the matter of the said complaint. Dated at St. John's, 25th January, 1858. By order of the commissioners, Robert Lilly, clerk." The summons of the 26th was to the plaintiff that he be before "the undersigned, two of Her Majesty's Justices of the Peace for the district aforesaid, at the Court House, in St John's, aforesaid, instanter, to give evidence before the above and other commissioners, appointed by His Excellency the Governor to inquire into certain charges preferred by the Marquis de Cabellero, Consul for Spain, against George Simms Esq, *in his capacity of Justice of the Peace for this Island.*" This summons was signed Laurence O'Brien, J.P., and Walter Grieve, J.P.

This is an outline of the case on behalf of the plaintiff.—Mr. Hoyles, for the defendants, did not deny the arrest and imprisonment of the plaintiff, but he contended upon two grounds that the defendants were justified in causing such arrest and imprisonment; first, because the commission under which the defendants with others sat empowered them to examine witnesses on oath, and that they had, therefore, a right to compel their attendance; and, secondly, that if that were not so, the defendants were justices of the peace, and were acting as such in causing the arrest and imprisonment of the plaintiff. He gave in evidence the commission from the Governor, the warrant to arrest, the commitment, the affidavits of Chancey and Devereux, and relied upon them as establishing a legal justification of the acts of which the plaintiff complained.

The following is a copy of the commission of the Governor:

"Know ye, that by virtue of the power and authority in me vested, I have thought fit to nominate, constitute and appoint, and do by these presents nominate, constitute and appoint the Honorable Laurence O'Brien and Walter Grieve, Ambrose Shea and Robert Prowse, Esquires, to be (or any three of them) a commission to inquire into, investigate and report upon the circumstances connected with the wreck of the Spanish vessel *Plata*, wrecked near Trepassey, in this island, in the month of December last, and touching the disposal and possession of the wrecked materials, specie and other property saved from the said vessel; and more particularly into certain charges preferred by the Marquis of Caballero, Consul of Spain, against George Simms, Esquire, a Justice of the Peace under the government of this island, in relation to his conduct about the

said wreck, materials, specie and property, which charges are dated the 14th day of January instant, and set forth, among other matters, that the said George Simms did 'take eighty ounces of gold, or three hundred and twenty pounds currency, which abstraction the captain opposed as much as he could; that many effects which have not been produced were seen in the Magistrate's house, such as, among other things, a cabin looking glass, in which were concealed his wife's portrait and a pair of gold earrings of a daughter lately dead, the spoons of the cabin service, which were of silver, the ship's flags, boxes of cigars, &c.' And that they do by these presents, being able and intelligent and well acquainted with the maritime laws and practice, openly, publicly, fully and impartially inquire into and investigate the circumstances and matters aforesaid, as well as the said charges; and for that purpose they are hereby authorised to swear and examine all witnesses and parties appearing before you touching the circumstances, matters and charges aforesaid, and thereupon, after making full inquiry and examination in the same, and hearing the parties concerned who may appear before them by themselves or their counsel or attorneys, to make such report thereupon to the Governor of Newfoundland as shall be just and consistent with the evidence, and transmit the same without unnecessary delay with such evidence to the Governor for the information and guidance of the government in the premises. And for so doing this shall be their sufficient warrant," &c.

The warrant to arrest recited that it "appears to us (the defendants) and *others commissioners* duly appointed," &c., and requires him to be arrested and brought before them, and the commitment follows in like terms. The case was argued with great zeal and ability by the learned counsel for the respective parties, and Mr. Hoyles, for the defendants, exhibited his accustomed research but failed to produce a precedent for the commission on which he relied; while Mr. Pinsent cited several authorities to prove its illegality in giving authority to the commissioners to swear witnesses. He referred to *2 Co. Inst. (pt. 2), 657, 658*, where the 25 Hen. 8 is cited, declaratory of the common law, in these words: "It standeth not with the right order of justice nor good equity that any person should be convict and put to loss of life, good name or goods, unless it were by due accusation and witness, or by presentment, verdict or process of outlawry, &c."; and also to page 479 in the

same book, where it is laid down that a new oath cannot be imposed upon any judge, commissioner, or any other subject without authority of parliament, as here it was; but the giving of every oath must be warranted by act of parliament or by the common law time out of mind. The proceeding in question in this case was not one in which the defendants were authorized or empowered to convict or award judgment against any person, but simply to inquire into the matters referred to them by the commission and to report thereon to the Governor for his information. Since the argument of this case I have earnestly endeavoured to ascertain the authority under which such commissions are issued, and the result has been that, in my opinion, there are strong grounds for holding that, by the common law, all commissions to inquire, without a power to determine, as in this case, are unconstitutional and illegal. In *12 Co., p. 31*, it is stated "note, commissions in English under the great seal were directed to divers commissioners within the counties of Bedford, &c., to enquire of depopulation of houses. &c., but the commissioners should not have any power to hear and determine the said offences, but only to enquire of them; and by colour of said commissions the said commissioners took many presentments in English and did return them into chancery, and after it was resolved (by nine judges) that the said commissions were against law, (for these reasons amongst others), that it was only to enquire, which is against law, for by this a man may be unjustly accused and he shall not have any remedy. Also, a party may be defamed, and shall not have any traverse to it." The same doctrine is laid down in *2 Inst. 163, 2 Hale 21, s. 5*. By *42 Ed. 3, c. 3*, confirmed by *16 Car. 1, c. 10*, it is enacted "that no man be put to answer without presentment before justices, or matter of record, or by due process and writ original according to the old law of the Court, and if anything henceforth be done to the contrary it should be void in the law." By *1. W. & M., c. 2, s. 2*, it is enacted "that the commission for erecting the late court of commission for ecclesiastical causes, and all other commissions and courts of like nature were illegal and pernicious." Mr. Hoyle, however, further contended that, no matter how the law was in England on this branch of the case, the Sovereign could, by prerogative, erect, or authorise the Governors in the colonies to erect, in the colonies such as a court as the one under consideration, and for that purpose he referred to *Chitty on the Pre-*

rogatives of the Crown, and to some opinions to be found in *Chalmer's Opinions*. In answer to that it would be sufficient to say that the Sovereign did not erect, nor did it appear in this case, in any way authorize His Excellency the Governor to erect the court or tribunal under consideration; but I will go further and say that such a power is not, in my judgment, vested in the Crown. The prerogative of the Sovereign in erecting courts of justice is thus laid down in *Comyn's Dig. Tit. Preg.*, 328, "The King, by his prerogative, may make what courts for the administration of the common law and in what places he pleases; but the King cannot erect a Court of Chancery or Conscience, nor grant to a court that it may proceed by the civil law; nor can he by charter or commission alter the common law. So the erection of a new court with a new jurisdiction cannot be without an act of parliament." These authorities are, to my mind, decisive, that the Sovereign could not erect, and *a fortiori* could not authorize a Governor or any other person to erect such a tribunal as the one under consideration, which, in fact, has no resemblance to a court of justice except in the name; the judges are not on oath and no judgment can be given; and this tribunal could not exercise any authority, power or jurisdiction on the assumption that it was a court of justice. However, usage, comparatively modern, has led to the recognition of mere courts of enquiry, distinguished from courts of justice in all respects but one, namely, the power to swear witnesses: the tribunal under consideration is similar to them. Thus I find in *2 Stephen's Commentaries*, where the author is treating of courts of justice, he states, not in the text, but in a note (559, vc.): "On some occasions the Crown directs a court of inquiry to be held, the object of which is to ascertain the propriety of resorting to *ulterior proceedings* against the party charged," and I have no doubt it was under this course of proceeding, so recognized, that His Excellency, or rather his legal advisers when they settled the commission, intended to institute the inquiry in the case I am now considering; but they erred in supposing that in such a commission a power to examine witnesses on oath could be given, or that if given it could be exercised without the sanction of parliament, as the authorities to which I have already referred establish. Such commissions of enquiry were frequently resorted to in the army, and I find the following description given of them by a writer on military tribunals: "A court of

enquiry is of a very delicate nature; a number of officers are assembled to inquire into an officer's supposed misbehaviour, and I have known them ordered to give their opinions in writing to the person who ordered them to assemble, that he may judge from their determination if there is sufficient matter to bring him to a general court martial. There is no article of war for this kind of proceeding, and, though it has frequently been complained of—because the members are not sworn and that its opinions may influence a general court martial, yet reason has hitherto been unsuccessful in its endeavour to abolish this unequitable custom in the army.”—*Sym's Mill. Dict. Tit. Court.* Similar commissions are frequently issued up to the present day by the Crown in England, and by the Lord Lieutenant of Ireland, to inquire and report upon the alleged misconduct of justices of the peace and other public functionaries, or into the causes of serious riots or other illegal conduct emanating from some public event or upon some occasion of public interest, or into the causes of serious affrays between the people and the military or the constabulary; but upon such commissions the evidence is not taken upon oath, nor would any lawyer in England or Ireland for a moment suggest that such tribunals possess the power to compel the attendance of witnesses or to arrest them in case of disobedience, or commit them if they refused to give evidence; and why? Simply because they derive no such jurisdiction by the common or statute law of the land. Upon all these grounds, therefore, I am clearly of opinion that the commission affords no justification to the defendants for arrest and imprisonment of which the plaintiff has complained in this case. It remains then for me to consider the second ground of defence, upon which their counsel, Mr. Hoyles, relied; that is, that the defendants caused the arrest and imprisonment of the plaintiff in their character of justices of the peace and not as commissioners. There is no controversy about the facts,—when the defendants did the acts complained of they were sitting with two other gentlemen as commissioners to inquire into, not any criminal offence, for none such was even charged against Mr. Simms, but simply into the circumstances relating to the property of the plaintiff saved from the *Plata*, and into the conduct of Mr. Simms, not as a man or individual member of this community, but as a justice of the peace. They had no prosecution before them preferring any criminal charge against

Mr. Simms or anyone else ; they had not summoned Mr. Simms or anyone else before them to answer any criminal charge ; but they were acting simply under the Governor's commission, which I need hardly say was not upon oath, and which I repeat does not even charge any criminal offence against Mr. Simms ; and, under such circumstances, I would have no hesitation in holding that, as justices of the peace they had no proceeding pending before them or then under their investigation to give them jurisdiction to compel the attendance of witnesses and oblige them to give testimony, and, upon their refusal to do so, arrest and imprison them, and that upon that ground the Imperial Statutes of the 11th and 12th Vic. cannot effect the decision of this case. But the whole of the proceedings prove to demonstration that the defendants were acting, not as justices of the peace, but as commissioners, who had not authority to compel the attendance of witnesses. The order of the 25th January was therefore worthless, so much waste paper, and the summons of the 26th was so likewise. The foundation of the warrant to arrest was the omission by the plaintiff to obey that summons, which he was justified in disobeying and disregarding. When arrested, before what tribunal was he brought ? Not before the defendants merely, but before them and their brother commissioners, three of whom, at the least, made a quorum. When he was there required to take an oath and give evidence, to whom was he called upon to give that evidence, and for what purpose was he to give it ? Manifestly to the four commissioners then and there presiding, and to enable them to frame their report to His Excellency the Governor, and for his non-compliance with the requisition of that tribunal the plaintiff was detained and imprisoned. For this imprisonment the plaintiff has brought this action and appealed to this court for redress, and as the law I have to administer is scrupulously careful of the personal liberty of every one within its jurisdiction, no matter to what country he belongs, and demands from anyone who invades it and seeks to justify such invasion, a clear, an honest, and a straightforward case of justification for the imprisonment complained of, and, as that has not been shewn by the defendants in this case, my judgment is that the verdict had for the plaintiff must stand, and that the rule to set that verdict aside must be discharged.

Hon. Mr. Pinsent for plaintiff.

Mr. Hoyles, Q. C., for defendants.

1859, January. HON. MR. JUSTICE SIMMS.

Master and servant—Sealing agreement—Shipwrecked sailors picked up at ice and taken on board sealer—Right of sailors to participate in proceeds of voyage.

The plaintiff was one of a sealing crew on board the *Thomas Ridley*. Two of the crew of the *Prima Donna* went astray from their vessel at the ice and were picked up by the *Thomas Ridley* and treated as shipwrecked sailors. Shortly after being picked up the *Thomas Ridley* struck the seals, and bringing in a full load, the crew made about £40 each. To this general result the two of the crew of the *Prima Donna* contributed their share. In an action by the plaintiff to recover his proportion of the two shares to which the shipwrecked men had contributed and which had been held by the defendant as the receiver of the seals on the notice of the captain of the *Prima Donna*

Held,—The plaintiff must recover. If there had been a wilful desertion on the part of the two of the crew of the *Prima Donna* and due notice had been given of the claim by their master, such a claim might not be untenable, on the grounds of damages for breach of contract, but their absence from their vessel was entirely due to accident, and the crew of the *Thomas Ridley* having settled with them their shares so stopped, must be divided equally amongst the whole crew.

THIS was an action tried at Harbor Grace before Chief Justice Brady last spring. The defendant resisted the claim of the plaintiff and the rest of his crew upon two grounds, 1st, that the two parties hereafter mentioned, viz.: Mason and Taylor, had claimed the property sought to be recovered by Connell and his fellows, and also that Delaney, master of the vessel in which Mason and Taylor went to the ice, claimed it as his. The Chief Justice, after taking the evidence on the trial at Harbor Grace, sent the case on to St. John's to be argued in the Supreme Court, where the rights of all parties might be tried. Mason and Taylor did not urge any claim, and so the defence rested upon the claim made by Delaney; and the case came on to be heard in the following cases, submitted to the Court by the contending parties. Mr. A. Emerson supported for the plaintiff; Mr. Hoyles for the defendant, and Mr. Pinsent replied.

(Case filed by Plaintiff.)

The plaintiff and forty-seven men proceeded to the ice in the spring of 1857 in the *Thomas Ridley*, Hanrahan, master, under the sealing agreement produced at the trial in Harbor Grace. After being at the ice some ten or twelve days, they picked up Mason and Taylor, two men belonging to the *Prima Donna*, Delaney, master, who had lost their vessel and were unable to

find her. They were treated by the captain and crew of the *Thomas Ridley* as shipwrecked sealers. After being on board some ten or twelve days, the vessel fell in with some seals, and Mason and Taylor hauled seals for two or three days, and threw them in with the general cargo, but did not assist in sailing the *Thomas Ridley*, or in the ordinary work on board such a vessel. On the arrival of the *Thomas Ridley* in Carbonear, the crew paid Mason and Taylor twenty-four pounds in full discharge of all and every claim they might have for any seals which they might have hauled. Mr. Rorke has stopped two men's full share of seals over and above the twenty-four pounds from the share of the proceeds coming to the crew of the *Thos. Ridley*, to abide the judgment of the Court in this case, and which sum the plaintiff in this action and his fellows seek to recover. Submitting that in no case could shipwrecked sealers claim a share of any seals they might contribute to the general catch of the rescuing vessel, as there was no contract express or implied, but any contributions and assistance given by the men so rescued was a voluntary return for the service rendered them and they have a right to claim from their own vessel. That in this particular case the question is set at rest by the payment of the twenty-four pounds. And the plaintiff respectfully refers to the evidence taken on the trial of Connell v. Rorke at Harbor Grace.

Archibald Emerson for plaintiff and fellows.

(Case filed by Defendant.)

Plaintiff and forty-seven other men proceeded to the ice in the spring of 1857 in the *Thomas Ridley*, Haurahan, master, under the sealing agreement produced on the trial of Connell v. Rorke, in Harbor Grace. About the same time Mason and Taylor hired to Patrick Delaney, master and owner of the *Prima Donna*, under the usual sealing agreement to proceed to the ice in that vessel. She went to sea, and after being out some short time, said Mason and Taylor, when in pursuit of seals, lost their vessel, and notwithstanding their efforts to regain her, they failed to do so. They subsequently fell in with the *Thomas Ridley* and went on board. Up to this time the *Thomas Ridley* had taken no seals. The *Thomas Ridley* shortly after fell in with seals, and Mason and Taylor who were active men, worked like the rest of the crew in taking seals and threw them in with the general catch. Upon the arrival of the *Thos.*

Ridley in Carbonear, bringing in over four thousand seals, the crew drew some money from Mr. Rorke and paid Mason and Taylor twelve pounds each in discharge of their share, but this amount was afterwards credited back to the crew in their respective proportions on Mason and Taylor claiming a full share. Delany claimed these men's shares as the property of his vessel to go to the credit of his vessel and be divided equally among his crew, including Mason and Taylor, each share being about forty pounds, which sum the plaintiff and his fellows seek to recover from defendant. Mason and Taylor have also taken an action against defendant for whole shares.

It is contended by defendant that the crew of the *Thomas Ridley* lost nothing by the payment or stopment of a full share for each of these two men, as they being able men, caught their share and were entitled to their catch, the same as if instead of throwing their seals among the general catch, they had stowed them away apart from the rest.

The evidence taken on the trial of *Connell v. Rorke* in Harbor Grace is respectfully referred to as part of the case.

The Court took time to consider, and at a subsequent day Acting Justice Simms delivered the following judgment:

This action is taken to recover the plaintiff's proportion of two shares of seals, £79 17s. 10d., stopped from the crew of the sealing vessel *Thomas Ridley* by the defendant who received the seals, on the ground that Patrick Delaney, master of the sealing vessel *Prima Donna*, claimed such shares on account of Taylor and Mason, two of the crew of the *Prima Donna*.

It seems that Taylor and Mason were shipped as sharemen on board the *Prima Donna* in the spring of 1857 under the usual sealing agreement, and while on the ice in pursuit of seals lost their vessel by accident and after being some time on the ice were picked up by the *Thomas Ridley*, which vessel shortly after fell in with seals, and it is admitted that Mason and Taylor were active in taking seals with the rest of the crew, though it is denied that they assisted in the ordinary work of the ship. After the *Thomas Ridley* came to port it appears that Mason and Taylor made a settlement with the crew of the *Thomas Ridley* and received £12 each in full for their claim. It is said Taylor and Mason have since taken actions for their full shares, but they do not appear and are not represented in this proceeding, and we have to deal only with the claim of captain Delaney who seeks to obtain two full shares of seals per *Thomae Ridley* on the ground as stated by the learned counsel

(Mr. Hoyles) that Delaney as the master is entitled to them as earnings of his servants.

If there had been a wilful desertion and breach of contract by Taylor and Mason, and due notice given of the claim of Delaney, we do not say that such claim would be altogether untenable on the ground of damages for breach of contract: but here the admissions and evidence both concur in attributing their absence from the *Prima Donna* entirely to accident, and while we have not evidence to enable us to judge clearly of the extent of legal claim which they might have had upon the catch of seals per *Thomas Ridley*, we have evidence of the settlement and payment of their claim by payment to Taylor and Mason of £12 each with which it is said they were fully satisfied. Under these circumstances we must give judgment for the plaintiff.

If Taylor and Mason should claim and be entitled to shares of seals per *Prima Donna*, of course it would be a legitimate deduction to subtract the £12 they made by their labour elsewhere from such shares.

Mr. Pinsent and *Mr. A. Emerson* for plaintiff.

Mr. Hoyles, Q. C., and *Mr. Flood*, for defendant and Delaney.

1859, *January*. HON. P. F. LITTLE, ACTING C. J.

Criminal law—Arson—Power of Court to send back jury to reconsider their verdict when they have agreed.

In a case where the prisoner was charged with arson, the jury, after an hour's deliberation, came into Court with a verdict of "not guilty," the presiding judge refused to receive the verdict, and having read over certain portions of the evidence to the jury sent them back to reconsider their verdict. The jury returning into Court a few minutes after with the same verdict, the prisoner was remanded.

THIS was a charge of arson, there were two counts in the indictment, one for that he the said James Cunningham did on the 28th day of November, 1858, at St. John's, unlawfully, maliciously and feloniously set fire to a certain dwelling house, there situate in the possession of him the said James Cunningham with intent to defraud two several Insurance Companies, called the Liverpool and London Fire and Life Insurance Co., and the Royal Insurance Co.; the second for setting fire to a certain dwelling house of one John Power.

The Attorney General stated the case to the jury (the nature of which can be gathered from the following evidence) and after referring to the circumstances connected with the case impressed upon the jury that the crime of arson was one which seldom could be reached by direct evidence, the evidence must necessarily be circumstantial and that considering the enormity of the crime committed, being as it was in an extensively wooden district and thickly populated neighborhood, no scruples on account of the age, family or other consideration should deter an honest jury (should they be convinced of the evidence of his guilt) from finding the prisoner at the bar guilty.

Mary Cunningham, daughter of prisoner, lives on Marsh hill; on Sunday morning, the 28th November, mother went to mass at 8 o'clock. I remained home. Father asked me to bring in a light; he was in bed and I lighted a candle with a match which I threw into the kitchen grate, took the lighted candle into the bedroom and put it on a box alongside of the bed; my father lighted his pipe from the candle; he gave me money to buy beef for our dinner before he lighted his pipe; he did not get up while I was there; did not see any shavings on kitchen floor when I left; there were shavings in a back room off the kitchen; there could not have been shavings in the kitchen when I went out; my father had no clothes on but his shirt

when I saw him in bed. I went to Forristal the butcher's in the middle street. I was absent about half an hour when I came to the door; saw smoke coming from my father's house; saw William Hinchey there; saw Hinchey and my father go into Mrs. Redmond's house next door before the people gathered about the place. I saw Hinchey rise the latch of my father's door, but I cannot say whether he went in or not; saw the smoke coming out of my father's house before Hinchey and my father went into Mrs. Redmond's; my father was in his shirt sleeves but had his hat on; he did not have his coat on when he went into Mrs. Redmond's; saw a counterpane thrown out, it contained one of my father's coats and some fustian trowers: my father stood by the door outside. There were two beds in the bedstead my father slept in: they were filled with shavings; the bed I slept on was filled with shavings; my father never told me his furniture was insured. When Hinchey raised the latch of the door I saw smoke coming out; my mother made the fire on that morning and I put the tea kettle on the fire. The paper on the wall of the bed-room was scorched and a table partly burned, and some serge drawers, shirts, two blankets and other things were burned. The floor of the kitchen under the window was burnt, a hole was burnt in it. I slept in a room apart from my father's, and the entrance to it was from the kitchen and a partition between it and my father's bed-room; my bed was burnt as well as the two beds my father slept on. I saw a board loose after the fire was put out, between my room and my father's, but it was not so when I left in the morning; my bedroom was farther away from the kitchen windows than my father's room. The witness here deposes to the different articles of furniture as comparatively valueless, &c., there was no feather bed in the house of any kind.

In the cross-examination she said she frequently went of a Sunday morning to this butcher's for meat, and father was in the habit of smoking in bed of a morning; her mother used often to scold her for the careless manner she brought a light: there were several light articles of dress hanging about the room. There were two feather pillows in father's bed-room.

James Aspell lives next door with Redmond, to prisoner, on the morning in question sitting at the fire when heard Cunningham call at Redmond's door, "Redmond, your bedroom is on fire"; Redmond replied that it was not, going into bed-room at same time. Redmond and witness went outside. Cunning-

ham had hold of the latch of his door which was shut, we wanted to get in, he seemed disinclined to allow us; at last we forced in the door, when smoke issued out so as to prevent us going in; we threw water on the fire; went in, saw a bedsack in a back bed-room smoking and the shavings in it on fire; water was thrown on it; from time we shoved prisoner off the door steps up to putting out of fire, did not see prisoner.

Redmond corroborated the foregoing. I saw fire in three different places of the house entirely unconnected with each other at same time.

John Bowring, Agent for the Liverpool and London Fire and Life Insurance Co, deposed to prisoner on the 30th August last insuring his furniture, &c, for £50 which he then said they were worth; his application for insurance two days after fire, his signing the statement drawn up according to his direction, his stating that the beds were feather beds, and that he was insured in no other office.

Stephen Rendell, Agent for the Royal Insurance Company of London: Prisoner was insured in his office, applied for payment after fire, and his representing himself as not being insured in any other office.

W. H. Mare, Notary Public, made out prisoner's statement for the 'Royal'; prisoner assured him repeatedly that he was not insured in any other office and that the beds were feather beds.

P. W. Carter, magistrate, deposed to prisoner appearing before him to swear to his statements, his twice endeavoring to evade the obligation of his oath, by kissing his thumb, &c.

Mr. Whiteway addressed the jury, remarking upon the evidence being only inferential, no direct proof or satisfactory circumstantial proof of prisoner being the guilty party, and called a few witnesses as to character.

Acting Chief Justice Little charged the jury at great length; he referred to the strong case made out by the Crown, which was unexplained by anyone on the part of the prisoner; the prisoner sending the little girl away, his being then alone in the house which shortly after is on fire, his reluctance to admit Aspel and Redmond; the discovery of three fires in different parts of the house; his conduct with reference to the insurance offices, &c. His lordship dwelt most strongly upon the nature of the crime, not being in scarcely any case susceptible of direct proof and can only be reached by circumstantial evidence.

The jury after an hour's absence returned a verdict of "not guilty."

The Court, after deliberation, stated that, however reluctant they were to interfere with the free volition of juries, the interests of justice in this case demanded that they should allow the jury time for re-consideration.

Foreman: My lords, we are unwilling to convict on circumstantial evidence; here there is no direct proof.

Court: Whoever would in the open day and before the eyes of witnesses, apply the torch for the purpose of incendiarism, must be a madman or a fool, and would be exempt from punishment, as the law visits neither the one nor the other with punishment.

His lordship Judge Little then read parts of the evidence to the jury, who again retired, and after a few minutes absence, returned again into Court with the same verdict.

Judge Little: Prisoner at the bar, a jury has acquitted you, but we feel it our duty to remand you to prison to enable the Crown to determine what further course it will pursue.

The prisoner was then remanded.

Attorney General for Crown.

Mr. Whiteway for prisoner

IN RE INSOLVENCY BULLEY, MITCHELL & CO.

1859, *January* BY THE COURT.

Insolvency—Declaration of Insolvency—Application for certificate and final discharge—How far declaration estops creditors from urging for punishment of insolvents on application for certificate, matters which might have been put forward on original application—19 Vic., cap. 4.

Creditors are not estopped from urging matters at the hearing of an application by insolvents for their certificate of insolvency and final discharge, which might have been urged on the original application for insolvency. The declaration of insolvency is not conclusive evidence of the absence of fraud prior to the declaration.

THIS was an application by the two members of the firm above mentioned, for the certificate founded on the usual affidavit, except that it contained a statement that certain move-

able chattels mortgaged to a creditor prior to insolvency for a sum much greater than the debt were, still by permission of the mortgagee in possession of the applicants. The judges adjourned the case to provide themselves with the evidence taken upon the original application to be declared insolvent by the Chief Justice and Acting Justice Emerson; but heard Mr. Carter and Mr. Pinsent, and Mr. Hoyles contra, as to whether under the 19th Vic., cap. 14, the declaration of insolvency operated as an estoppel to the creditors to urge on the present applications such matters as might have been urged upon the original application for the punishment of the insolvents, and whether by such declaration fraud was not negatived, and also, whether taking the 10th section of the statute 19 Vic., cap. 14, in connection with the 24th section of the Judicature Act, matters contemplated by the first named section were not confined to such matters as would under the Judicature Act have disabled the insolvent even with the consent of half in number and value of his creditors from obtaining his certificate, and could not relate back to any time prior to the insolvency. The questions involved were reduced to the points above mentioned as the application was subsequently withdrawn with the hope of better understanding with the creditors.

Upon the question raised the judges were of opinion that the creditors were not estopped from urging matters prior to the insolvency; that the declaration of insolvency was not conclusive evidence of the absence of fraud prior to the declaration; and that the operation of the section was not confined as was contended.

Mr. Carter for Alexander Mitchell.

Mr. Pinsent for Wm. Bulley.

Mr. Hoyles, Q. C., for creditors and trustees.

1859, *January*. BY THE COURT.

Will—Will made by a married woman during life of husband—Acts of republication necessary to admit to probate.

Acts of republication when established have the same effect on the old will as if a new will were executed.

It was a case of a will made by a woman during the life of her husband, purporting to devise certain landed and other property, &c., not shewn to have been made by consent of the husband. The Court had decided that under these circumstances it was necessary for the parties supporting the will to prove acts of republication after the death of her husband, or to shew that the will was executed under a power.

Mr. Walbank now called witnesses to prove republication, four of the children of the deceased interested in the will, and two others who deposed to several references made by her in conversation about the will and its contents, and one of the witnesses deposed that the testatrix had delivered the document to her shortly before she died with directions to have it read after death. It was also proved that the husband in his lifetime knew of the existence of the will.

Mr. Pinsent contended that no evidence of republication could give vitality to a document which was originally invalid, and that this was not so as it was not shewn to have been executed under a power, or to be a will of separate property, nor that a sufficient consent in law of the husband had been given to its original execution, and if it had that it did not avail after the death of the husband, and cited William 48, 49, 55, 196, 188.

The Court held that the acts of republication were as if a new will had been made, and that the will was good so far as the testatrix was legally interested in the property conveyed, and granted probate to the executors.

Mr. Walbank for executors.

Mr. Pinsent for next of kin excluded by will.

1859, *January*. HON. MR. JUSTICE ROBINSON.

*Ejectment—Title—How rights to public lands of the colony are acquired—
Practice—New Trial—Misdemeanor.*

Possession short of twenty years is a sufficient title in ejectment against a party who, without any show of title, comes and takes forcible possession of land.

THERE had been a verdict found for the defendant on the trial of the issue of fact in the last term; and a rule *nisi* obtained for a new trial argued to-day, and upon which at a subsequent day the following judgment was delivered by Mr. Justice Robinson.

On Monday last, Mr. Hoyles, counsel for the defendant, shewed cause to a rule *nisi* for a new trial on the ground of misdirection, obtained by Mr. Little. We are all of opinion that the verdict given for the defendant is consistent with the evidence, and consonant with the justice of the case; and unless the charge of the judge was erroneous, and moreover erroneous in a matter which must necessarily have effected if not occasioned the verdict, we should not feel justified in disturbing it. It appeared from the evidence of the plaintiff's witnesses that the land from which he sought to eject the defendant had been in the actual occupancy of the defendant for nineteen years; that it had not been fenced or cultivated before he took it into possession; that he found it "green woods," cleared a portion of it, built a house upon it, and has lived upon it for that period. The party through whom he claims (Mahony) states that about forty-five years ago he was minded to take in a piece of waste land, and went to the side of Cat's Cove, where were no establishments, where he selected a spot but he did not clear it, or fence it, beyond laying a beam or stick eight or ten feet long by the waterside, one end resting on a road, the other on two little spars, that after a couple of years he abandoned it, leaving it "green woods;" that after he had so left Carey asked him about the land, when he replied that he did not bother about it, and that he did not care if he (Carey) took in half the district; whereupon Carey put up a short piece of fence along the water side, notched a few trees, cultivated a portion of ground sufficient to grow a few barrels potatoes, and kept it in possession for twelve years, when he died, twenty-eight years ago; his wife (who did not administer to his estate) held it for two years after his death, when she also left it, making an occupancy of fourteen years between them; that then the place lay

void ; and that neither she nor any of her family ever meddled with it since that time, which is twenty-six years ago ; that whilst it was thus lying void, one Edward Doyle took possession of the whole of the ground which Carew had re-claimed. which he claimed under one Sweetman, who got it from Mrs. Carey, but that the defendant has no part of that, and it has nothing to do with defendant's place. It also appeared that all the cultivated land in the defendant's possession had been cleared. On these facts, moved by the plaintiffs own witnesses, I was of opinion at the trial that he had established no case to entitle him to recover. Mr. Little wished to take the verdict of the jury, which he had an undoubted right to do, when the defendant adduced evidence to prove that in point of fact neither Mahony nor Carey ever had possession of or made claim to the land he had in his, defendant's occupancy, and that the plaintiff's witnesses were mistaken as to the fence they had deposed to. In my charge to the jury I told them that in such a case as the present, where the defendant had not made a forcible entry without any show of title upon land in the actual occupation of another, it was necessary for the plaintiff to establish a legal title on himself to the *locus in quo*, which must be done either by producing a conveyance or by proving possession of it for twenty years, or those under whom he claims, and I left it to the jury to say whether such had been proved, that it was also necessary for the plaintiff to prove a right of entry on the land, and that if he had been twenty years out of possession the statute 13 Vic. barred that right, and I left it to the jury to say whether they believed, from the evidence, that the land in the possession of the defendant was any part of that which Carey had had, and they found a verdict for the defendant with which we are all satisfied. We have given consideration to the argument of Mr. Little that the possession of Carey and Carey's wife may be presumed to have continued so long as the piece of fence they had put up remained in the ground, notwithstanding the manner in which the wife left the place, and as a stump remained undisturbed for six or seven years after she left it, the twenty year's possession may be so eked out, but we think that argument is more ingenious than sound. A right to the public land of the colony is not to be acquired by such constructive possession, and no man who expended his labor in the cultivation of our wild land could be secure of the enjoyment of the fruits of his industry if such a position were law.

We fully acknowledge the authority of *Hughes v. Dyball*, 3 c. and p. 610, that possession short of twenty years is a sufficient title in ejectment against a man who without any show of title, "comes and takes forcible possession of land," but we hold that it is not applicable to the present case. We are of opinion that there was no misdirection and that the rule for a new trial must be discharged with costs.

Mr. John Little for plaintiff.

Mr. Hoyles, Q. C., for defendant.

THOMAS AND DICKENSON v. MANDEVILLE.

1859, *January*. HON. MR. JUSTICE ROBINSON.

*Assumpsit—Bill of exchange—Interest upon balance of account—
Usage for charging interest.*

There is no usage or custom in this country which gives the right to charge interest in the absence of an agreement, or a course of dealing which would be evidence of an agreement. A creditor may, however, charge interest on his debtor's account without his consent, provided he has given the latter a written notice to that effect.

THE case was tried by a special jury. It was an action of assumpsit brought to recover the sum of £371 13s., being £265 16s. 8d. amount of a bill of exchange drawn by the plaintiff upon Messrs. Gisborne and Henderson, accepted by them, and dishonored at maturity on presentation and paid by the plaintiffs—the amount of the bill being the third instalment of the purchase money of the brig *Francis*, formerly a vessel of defendant; the remainder of the claim consisted of the items of £55 1s. 11d. charged in 1857, and £50 14s. 5d. charged in 1858, for interest upon balance of account. Mr. Pinsent opened the case to the jury, and called Mr. H. K. Dickenson, who deposed that defendant, having been a dealer of the plaintiffs for several years, and leaving a large balance on hand at the end of the year, it was in 1856 understood and agreed that interest at the rate of 6 per cent. per annum should be charged upon the balance of account at the close of that and succeeding years; that the balance at the end of the year 1856 was £1364 16s. 8d.; at the close of 1857 defendant was debited with interest upon £695 1s. 8d. for the whole year, and upon £669 15s. for four

months, this latter sum having been paid up within that time. This interest was charged in account on the 2nd December of that year, and the account furnished on the 4th December. In 1858 the balance was £1553 10s. 2d. upon £854 7s. 4d. of which interest was charged, the remainder having at the time the charge was made been paid up; defendant was given credit for current receipts upon the balance of preceding year. In April, 1859, Mandeville being in St. John's, called at plaintiff's office, went into inner office with witness, asked what his balance was; a conversation took place about interest, when in consideration of the balance of account having been reduced to £691 1s. 9d., and at defendant's request, it was agreed on condition of certain payments being made from time to time in reduction of the existing balance to forego interest in future. Witness made a memorandum of this in the ledger at the time; defendant never made any objection to the charges for interest until this fall. He did not get his pass-book filled up in 1858; he had his account filled up in September of this year, when the second charge for interest was put in. It was not until he came to St. John's, after a telegram was sent him by witness of the failure of Gisborne and Henderson that he raised any objection; this telegram was sent September 30th—he came over immediately from Brigus. The first time he called upon witness he said he would pay the balance of his account but not the note on Gisborne and Henderson; he called again and said he brought eighty-six ten pound notes and some change, the balance of his account. Witness referred to the ledger and said that was not the balance; he said it was, less interest which he was not bound to pay; he presented an account, made out by himself, admitting everything but the interest and amount of the dishonored bill. Witness was here examined as to the bill and said defendant owned a vessel called the *Francis*, he wanted to sell her. In 1855 he sent her to England for sale; his limit was too high and she returned. In 1858 she went to Labrador, and in the autumn defendant tried to sell her again; he was in St. John's; I mentioned to defendant that I heard Mr. Henderson wanted a vessel; he went to Henderson about her, they did not come to terms. He left the vessel here in charge of a person, and requested me to sell her for him. I advertised her, paid for labour and moorings, &c., which defendant paid in account. The following letters passed between plaintiff and defendant. (Here the letters were put in as evidence):—

Letter from plaintiffs to defendant of November 16th, 1858, informing him that there had been no offer to that time and advising that the sealing gear should be sent round.

Reply from defendant of November 22nd, saying that defendant had agreed with a boat to send the gear.

Letter from plaintiffs November 24th, 1858, advising that the vessel be painted.

Reply December 7th, saying that defendant would be satisfied to do what plaintiffs thought right.

Letter from plaintiffs, December 15th, 1858, apprising defendant that plaintiffs had made an offer of the vessel to Henderson for £800, one-third in cash, one-third at six months, and one-third at nine months.

Letter from plaintiffs to defendant, December 29th, 1858, saying that they had allowed Henderson two pounds ten shillings for the split bow-stringer, and advised defendant that with the plaintiffs' endorsement the bills could be discontinued, but that defendant must bear in mind plaintiffs did not guarantee the payment of the bills.

Letter from plaintiffs of June 7th, 1859, stating that Henderson required an extension of time on the bills.

Reply from defendant, June 23rd, telling plaintiffs it was optional with them to give the extension if they pleased; that defendant could have no objection, the matter rested entirely with themselves.

Letter from plaintiffs, October 1, 1859, advising defendant of the failure of Henderson and dishonor of the bill, enclosing protest, and request to transmit the amount.

Reply from defendant expressing his surprise, and stating that plaintiffs were well aware that defendant had nothing to do with Henderson; that they knew full well he had sold the *Francis* to plaintiffs, and had left a blank bill of sale to that effect, and that they had undertaken to take the risk of the notes, &c.

Defendant came over after receipt of the letter of Dec. 5th, 1858, and signed a bill of sale in blank to abide the completion of a sale here.

We had a conversation in April last on the subject of the notes for purchase-money of the *Francis*, when defendant expressed himself satisfied with the sale, and that he believed there was every probability of getting the notes paid. The extension asked by Gisborne and Henderson was not granted. Defendant is credited with the amount of the notes and debited

with the discount. It was for his benefit to reduce them to cash.

Mr. D. J. Henderson called. In Nov. last defendant came to me about sale of *Francis*, pressed me to purchase; his price was too high; I went on board the vessel with him, we did not come to terms; he referred me to Mr. Dickenson in case I wanted to have anything more to say about her. I finally bought her from Dickenson for £800, upon which there was a subsequent reduction of £2 10s. for a bow-stringer. I received a bill of sale from plaintiffs signed by defendant.

Cross-examined. I met Mandeville on the wharf; his offer was £900; he would, I think, have closed for that.

Mr. John Roscoe called: Is a clerk in plaintiff's office; gave Mandeville his account on December 14th, 1857, the interest was charged for that year, he brought the book this spring; he never made any objection to interest to my knowledge; he got his pass-book again filled up in July or August this year; he did not bring it in 1858; I saw him put his name to the bill of sale produced, and addressed it, it was then in blank—afterwards filled in by Henderson. If plaintiffs had intended to buy her there was nothing to prevent their name being filled. Was present this spring when Mandeville called, and he and Mr. Dickenson went into the inner office with the ledger—the memorandum was in it when it was brought back. After getting the telegram this fall he came—he first called with Mr. Little, but Mr. Dickenson was out, afterwards with a clerk of Mr. Nowlan's; I was present when he presented an account, made out by himself, less the interest, and when he offered to pay the money he afterwards paid it, he got a receipt in full.

Mr. Carter objected to the reception in evidence of the bill of sale, on the ground that it was not binding on defendant, having been filled up in blank and having no seal, and plaintiffs having no power to make it for defendant.

Mr. Pinsent, contra—There was nothing in the objection even if the title were in question, but the title to the ship was not in question here, it was as to agency in the matter of the bill.

The court overruled the objection, reserving the point.

Mr. Carter then addressed the jury for the defence, and called Mr. Richard Mandeville (the defendant), who deposed—The first time I saw the entry of interest was in *Brigus*, when I brought home the book in the fall of 1857; on my return the next spring I objected to it. Mr. Dickenson said in the fall of

1857 he could not be out of his interest on so large a balance; this was the first talk of interest; I said I would pay him all but the interest, that he would be very well off if he got that. He said he didn't know where he should get money without paying interest. In the spring of 1858 I discovered I was charged interest and objected. It was only this fall I got my account for 1858, when I found the second charge for interest. I received it the 24th September; after getting the account I left immediately for Brigus; came to St. John's a week after the return of the *Francis* from Labrador last year. I said to Mr. Dickenson I had no business for the *Francis*, and asked him to take her off my hands; he said he did not want her, but would do his best to sell her. Early in November I came to St. John's again, Mr. Vail (Thomas's storekeeper) said Mr. Henderson had been looking at the vessel. I mentioned it to Mr. Dickenson, who said, go and see Henderson; I told Henderson the vessel was insured for £1300, that she should be sold for £900. I said the terms should be entirely between him and Dickenson, as the payments were going to him. I went to Brigus; came to St. John's the end of November: Mr. Dickenson said he had a proposal from Henderson of £850 in four payments, but he would not accept that as the fourth payment went into January, but he had offered to take £800, one-third in hand, one-third in six months, and one-third in nine months, and he expected an answer. I said something about Henderson, that I knew nothing of him, any transactions should be between themselves; I said this more than once. I had a late conversation about Dec. 15th when I said to him, you credit my account with £800 and I don't care; the matter of payment is entirely with yourselves, I will have nothing to do with the risk of the notes. Dickenson said we sold Henderson a vessel last year and he paid us, and to relieve you of the vessel we will take the risk, but you will require to leave a bill of sale; I will send to the custom house for it, he said; I will see if we can get the discount from Henderson, and that will make the £800 cash to you; this was the 9th December. I said if you make use of his paper you will have to allow discount. The bill of sale was expressly to be filled up in the name of Thomas & Co. I left for Brigus, and met with an accident on the way which laid me up for three weeks. On the third day of this month was the first intimation I had of the bill of sale being in Henderson's name. In April, in speaking of the notes, Dickenson said it was all right, that they had a lien on Hen-

dereson's place; he told me in April last my balance was £696 some odd. I said it was impossible unless he charged interest, that I would not pay interest, but would reduce the balance every year. The first idea I had of liability on the notes was when I got the telegram. I objected to the interest when I saw the two items charged; I never agreed to pay it.

Cross-examined—When I went home in the fall of 1857 I saw first entry of interest; I examined my book, a great many letters passed after, but I said nothing in them against interest. I objected when I came in the spring. I do not remember the conversation in 1856; it was in 1857; I cannot remember which I said I could not or would not pay it; it was I would not; I didn't bring my pass-book in 1858. I was here two or three times spring and fall; did not ask what my balance was in 1858; pass-books were given to be filled up from time to time. After getting home in September last, saw the second charge; did not write about it; made frequent payments on account after the first charge of interest. I was not in treaty with Henderson about the *Francis*, I did not care as long as I got credit for £800. If Thomas & Co were to be responsible to me, I should have no objection to the bill of sale being filled up in Henderson's name; had received plaintiff's letter of December 19th before I signed it; I dare say that letter was the cause of my coming to St. John's. I had received the letters of Dec 29th and June 17th at the time I say I first knew it was in Henderson's name by going to the custom house. It was not my impression after our first conversation about interest that Dickenson meant to charge me with it.

Mr. Pinsent closed the case to the jury, after which Judge Robinson charged them. After stating the nature of the claim, his lordship said that it was quite plain that the failure of Mr. Henderson had created the chief, if not the entire difficulty. When Mr. Dickenson deposes to certain facts which Mr. Mandeville positively contradicts, when the plaintiffs endeavour to support a position which they say they always maintained, it would be for the jury in determining the result to draw light from the state of facts such as they existed before the insolvency. It was hard in the present case to draw a correct conclusion without looking at the surrounding circumstances. He trusted that neither the presumed wealth of the plaintiff on the one hand, nor the humbler position of the defendant on the other, would for an instant tempt them to abandon that strict desire to do impartial justice without which disastrous consequences would ensue.

The questions for them to consider were two-fold—the interest and the amount of the bill. There was no usage or custom in this country which gave the right to charge interest in the absence of an agreement; or a course of dealing between the parties which would be evidence of an agreement, but the law allowed a creditor upon giving a written notice to that effect, to charge interest upon his debt without the consent of the debtor. The plaintiffs claim under a positive agreement, and it was for the jury to say, what degree of credit they attached to the evidence of Mr. Dickenson, on the one hand, and Mr. Mandeville on the other? If they found upon the whole that interest should be charged, then they would on this score give a verdict for the plaintiffs for the amount claimed, if otherwise they should not find for interest. As to the second claim for £265 16s. 8d., there is altogether a conflict of testimony. If they believed defendant left the vessel here to be sold, and that her proceeds were to go to the credit of his account, that plaintiff acted as his agent in the sale with defendant's assent, that they did not buy the vessel for themselves, and did not undertake to run the risk of the notes, they were bound to find for the plaintiff. If on the other hand they believed that really and truly defendant had given over the vessel to Thomas & Co. who accepted her as their own property, and that Mandeville had nothing to do with Henderson or his notes, then the plaintiffs would be acting upon their own account and their verdict should be for the defendant. The principle for them to apply was, what was the understanding before the failure of Henderson had complicated matters.

If Mandeville was contented with the bargain, and that the vessel was sold on his account and was credited with the purchase money, the amount of the bill was paid for him, and he is bound to repay it. Here his lordship read through the evidence. They were to say from that what was the honest intention of the parties before the insolvency, and to give their verdict accordingly.

The jury returned a verdict for the plaintiff for £265 18s. 8d.

Mr. Pinsent for plaintiff

Mr. Carter for defendant.

1859, January. HON. MR. JUSTICE ROBINSON.

Waters, public—Waters of the Harbor of St. John's, acquirement of easements in same—What adverse possession of waters of harbor will bar the rights of the crown—What will bar the rights of a subject.

A party who erects a wharf under and over the waters of the harbor of St. John's, and occupies exclusively and adversely the soil and water for a period of over forty years, acquires a right to such soil and water easement as against the crown, and they become the private property of the occupant. A like occupancy of twenty years would suffice to bar the rights of a subject to the use of such soil and water.

ACTION on the case—The cause of action is explained by an adopted statement of plaintiff's declaration—that the plaintiff being possessed of land, wharf and premises situate in St. John's, and adjoining to and abutting in and upon the public navigable waters of the harbor of St. John's, and by reason thereof had a right of way to and from the same unto, into, over and upon the said navigable waters of the harbor, for himself and his servants to pass and repass with their ships and boats at all times, at their free will and pleasure: And whereas a vessel was lying and moored to said plaintiff's wharf in said waters—yet defendant, whilst said vessel was so lying and moored to said plaintiff's wharf on 30th December, 1858, wrongfully placed a certain vessel of his (defendant's) across plaintiff's waters and way, without properly and skilfully mooring the same so as to prevent plaintiff from removing his said vessel the *Eliza*, from his said wharf and continued the obstruction there until 10th January following. By reason of which obstruction and unskilful mooring the plaintiff's right of way was stopped, and he was prevented removing his vessel which on the 6th January was by the force of the wind and waves driven against his wharf which wharf became totally destroyed—damages laid at £300.

The plaintiff proved the circumstances, defendant's vessel being badly moored, &c., and damage to his wharf.

The written evidence of Captain Geyness, captain of the *Zambesi*, Hector McDonald, mate, and John Rendell, was of a similar character.

Messrs. Pitts and John Woods, surveyed wharf, and estimated damage at £145.

The defence was,—1st, That he had the right of user, to the water where his vessel lay; 2nd, That the defendant's vessel was properly moored; and 3rd, That whether he had the right or not, or whether or not his vessel was improperly moored,

that plaintiff's vessel substantially contributed to the damage which debarred plaintiff from any remedy for his alleged loss.

Several witnesses were called for the defence, and Mr. Hoyles having replied.

His lordship, Judge Robinson charged the jury. The plaintiff claimed damages from the defendant for injury to the plaintiff's wharf, occasioned by the defendant's vessel during a gale on the 5th January last. The plaintiff's case is two-fold; first he alleges that he, having a right of way over certain water of the harbor in front of his land, was obstructed in the use of such way by the defendant's vessel, *Christian*, whereby the injury was occasioned to the wharf; and secondly, he alleges that whether he had or had not such right of way, the damage was occasioned by the unskilful and improper mooring of the defendant's said vessel. To this case the defendant sets up three grounds of defence; 1st, that he had the use of the water in question, and had a right to be where he was; 2nd, that his vessel was not improperly, but was properly and sufficiently moored; and 3rd, that whether he had or had not the use of the said water, or whether his vessel was improperly moored or not, the loss was occasioned by the plaintiff himself; his vessel, the *Eliza*, contributing substantially to the damage. As regards the first defence of user, if the plaintiff has proved a right of way in himself, the jury must be satisfied that the user by defendant of those under whom he claims, *was continuous and uninterrupted for 20 years*, and was adverse, that is against the assent of the proprietors, and not by virtue of any lease or agreement with such proprietors. With respect to the second, the defendant would be bound in the mooring of his vessel to exercise that ordinary care and skill which a prudent and careful man would have done, but would not be responsible for damages arising from extraordinary and excessive gales, provided he is free from negligence himself; and with reference to the third defence, if the jury believed the plaintiff's vessel really and substantially contributed to the loss, the plaintiff must bear the consequences of his own act, and would not be entitled to recover from the defendant. The evidence was as to some points of a conflicting character, and he would read it to the jury. The first question the jury would ask themselves was, has the plaintiff established a right of way over the water in question—if he has, and that right has been obstructed by defendant, whereby the damage had been occasioned by the plaintiff, they should find for the plaintiff: 2nd, If the plaintiff

had no right of way over the water in question ; then the next question is, did the damage result from the improper mooring of defendant's vessel ; if so, they will give the plaintiff a verdict. Unless they should find as the third question that the plaintiff's own vessel, *Eliza*, occasioned or even contributed materially and substantially to the loss, if she did, the plaintiff is not entitled to contribution from defendant, and their verdict should be for the defendant. And here, his lordship said, he might close his observations to the jury ; if a question of considerable importance and much controverted during the trial had not arisen, although not on the pleadings, namely the right of the proprietor of the land to the exclusive use of the water of the harbor in front of it. The learned counsel, Mr. Carter, who had ably conducted the defence, had stated, " that it makes no difference who has the land with reference to the water in front of it " ; to that proposition his lordship could not accede, and as it would be productive of much inconvenience and litigation, if it was supposed that the law which governs the title to the most valuable property in this town, namely—waterside premises, were uncertain, and that any person could place his vessel in what water he pleased, and throw upon the occupant the burden of proving his title, he thought he should not be justified in evading the responsibility of noticing the question.

It is quite true that by the common law the sea and the soil thereunder below high-water mark are public property, free for the use of all Her Majesty's subjects, but it is equally true that by prescription, individuals may acquire a private right in them, against the Crown and against the subject. Thus, if any individual has been suffered to erect a wharf upon the soil under the public water, and to occupy exclusively and adversely such soil and water for a period of forty years, the right of the Crown to such soil and water easement would be lost, and they would become the private property of the occupant, and a like occupancy for twenty years would suffice to bar the rights of a subject to the use of such soil and water. Now, it is notorious, as well from our own experience, as from Acts of Parliament and judicial decisions, that St. John's has been settled for a period very far exceeding the term of prescription, and that the greater part, if not the whole, of the waterside property here has been occupied by private individuals for a much longer period than forty years. Under such circumstances, he thought the presumption of law should be in favor of quieting possession, and that the proprietor in fee of the land adjoining the harbor in

St. John's should be held *prima facie* to have the right to the exclusive use of the water in front (subject, like every other legal presumption, to be rebutted or varied by evidence), the extent and character of such right depending entirely upon actual and prescriptive user; and that any person who should extend his wharf one foot beyond the space he may have acquired by prescription will be guilty of a public nuisance.

His Lordship told the jury that in this case there was positive evidence that Lady Tonkin and those under whom the plaintiff claims, had for a long series of years exercised an exclusive use over the water in question, and if they believed that evidence they should require clear proof to satisfy them that so valuable a portion of their property had been abandoned by the proprietors. He then read over the evidence to the jury, who found a verdict for the defendant.

Mr. Hoyles, Q. C., for plaintiff.

Mr. Carter and *Mr. Little* for defendant.

EAGAN v. BARRON.

1859, *January*. HON. SIR F. BRADY, C. J.

Waters, public—Waters of the Harbor of St. John's—Acquirement of easements in same.

An exclusive and adverse occupancy of the soil and waters of the harbor of Saint John's for twenty years creates an easement in the said soil and waters, but not against the Crown, and only to such waters and soil as is in front of his land.

THIS was a case somewhat similar to that of *O'Dwyer vs. Tessier*, and occupied the 2nd, 3rd and 4th December; it was tried by a special jury. The Chief Justice charged them at great length and to the effect following: The plaintiff, having brought his action against the defendants, claims compensation for injuries and interference with his water privileges adjacent to his premises on the South side of Water Street. The complaint is for obstructing and occupying the water in front of his premises, and the access from the harbor; and in sending this case to them for, he hoped, the last time, he might say that this is one of a class of very important cases affecting

waterside property in the town of St. John's. Here His Lordship adverted to the enhanced value of such property, and in sending the case to them for, he believed, final determination, it afforded him great satisfaction to see before him a body of gentlemen so competent to decide upon a question of that kind and who had paid a degree of attention to it for which the parties ought to feel very obliged.

In support of the plaintiff's claim he had put before them the title under which he held. Prior to 1809 the family of Styles were owners of the property—and they might assume that at that period Styles had whatever water privileges the plaintiff is entitled to. It appears that he had an easement in front of his premises. In 1809 he made a grant to McCarthy—in that grant there were words of considerable importance and of unusual character—the expression in the grant was, after describing the premises “together with all the rights, privileges and appurtenances thereto belonging.” It is fair to presume that McCarthy had an easement over the water.—Some time prior to 1819 McCarthy died, leaving a widow who became entitled to the property—she married one Laurence Barron. In 1825 a conveyance was executed from Patrick Doyle, trustee of Mrs. Barron, to Laurence Barron, her husband. Some time about 1836 Laurence Barron died, when administration to his estate was granted to Patrick Kough and Mrs. Barron, who became entitled to the property, and gave a lease to McDougal—the property was occupied by McDougal until 1846, when the lease was surrendered. The next document is a lease in 1847 to John Stuart, whose interest was assigned to the plaintiff in 1850. The plaintiff lays the whole of this documentary evidence to shew that the interest held by McCarthy in 1809 is derived by himself, and that he is entitled to the water privileges incident and adjacent to his property, and that he and his predecessors have never lost or abandoned them by the adverse possessions of the defendant or anybody else. If the plaintiff had satisfied them of this, he was entitled to their verdict.

This was a simple outline of the plaintiff's case, against which Mr. Hoyles relied on several defences. First—That the plaintiff claimed more soil than he was entitled to. On that point the utmost water the plaintiff would be entitled to was as much as was in front of his land. Secondly—That the plaintiff is wrong in supposing the defendants had interfered with him—it was Brennan to the eastward who had done so. If the jury

adopted that view, he (Chief Justice) need hardly say that they must find for the present defendants. Thirdly—That the evidence established, if any, a concurrent right of user with defendants.

The question of concurrent right was a very troublesome and delicate one as affecting at the present moment the fisheries of the colony, and they should have very conclusive evidence before they would establish so dangerous and so fertile of discord, litigation and disturbance. Fourthly and lastly, and by far the most important position put by the learned counsel for the defence, was that his client and predecessors had undisturbed and exclusive possession adverse for twenty years.—Upon that subject a great body of evidence had been laid before them. The plaintiff called seven witnesses to show that he and previous tenants had used the waters in question from time to time as necessity required for upwards of thirty years. Here His Lordship referred to the evidence of Patrick Kough; of McDougal, the occupant from 1837 to 1846; of John Stuart, the next tenant, whose exercise of the right was trifling; of Laurence Maccassey, who speaks of his intimate knowledge of the premises and of his occupying the water by permission of Laurence Barron; of Mr. Cusack, who had a knowledge extending over thirty-five years, and sometimes rented the premises; of Mrs. Driscoll, who said she remembered the premises since she was ten years of age, and knew the agent of Rennie, Stuart & Co. to come and ask permission of Laurence Barron to put a boat to the east side of the wharf; and then the evidence of Mr. John Martin—whose evidence was very strong—who remembers, in returning from Labrador, a party who occupied Brennan's premises, putting a vessel on the west side of Brennan's wharf, when Laurence Barron went down and ordered the vessel off, and she was removed to make way for another. All this evidence was for the jury, and went far to establish a continuous user to the present time. The defendant, on the other hand, produced five witnesses—Mr. Kenneth McLea, who deposed to his knowledge since 1830, and had frequently seen vessels of Rennie, Stuart & Co. on the east side of the wharf and on the water claimed by the plaintiff; next, the evidence of Mr. Warren, formerly a clerk at Rennie & Stuart's—from 1833 to 1846—and whose evidence is strong to show use of the water on the east side; then the evidence of Mr. Page, who drew the plans; of Mr. Barron, the defendant, who states his user in 1855; the action was brought in 1857;

and also the evidence of Mr. R. Prowse. On a fair consideration of the whole evidence they were to say whether the plaintiff had satisfied them of his right to the water in front of the premises and that he had been obstructed in that right by the defendants. If so, they should find for the plaintiff; they were not obliged to find any particular number of feet, but simply a substantial interference with the *plaintiff's right*. If they felt the plaintiff had failed to establish that right, to find for defendant.

A juror remarks that it would be advisable to determine the boundaries.

By the Court—Evidence of any material interference is enough for you; you may afterwards, with consent of parties, fix the boundaries, but it is taking a responsibility and trouble you are not required to take.

Verdict for £20.

Mr. Carter, Q. C., for plaintiff.

Mr. Hoyles, Q. C., and *Mr. Little* for defendant.

EAGAN v. BARRON AND FRASER.

1859, *January*. HON. MR JUSTICE SIMMS.

Waters, Public—Waters of the Harbor of St. John's—Acquirement of easements in same—When the extension of wharves over the public waters is a nuisance.

An exclusive and adverse occupancy of the said waters of the harbor of Saint John's for twenty years creates an easement in the same, but not against the Crown. An extension of a wharf into the harbor of St. John's is a public nuisance and may be abated at any time within forty years of its erection.

ACTION on the case for the obstruction of water privileges. The declaration charged that the plaintiff being possessed of certain lands and waterside premises with the appurtenances in St. John's ought to have the full and uninterrupted use of the water of the harbor adjoining such land from and out of the said land and premises unto, through and over the said waters and back again for himself and servants, his ship's boats, and other craft to go, return, pass and repass and remain at his and their free will and pleasure at all times. Yet the defendants on the 3rd June, 1857, and on divers times since unlawfully put and placed five ships and five boats upon the said

waters of the plaintiff and kept the same there, thereby obstructing the plaintiff in the use of such water and depriving him of large profits and wages which he would receive from certain parties for the use of said water, &c. Damages were laid at £100.

Defendants pleaded the general issue. The plaintiff's and defendants' witnesses having been gone through, acting Judge Simms charged the jury to the effect that the navigable waters of the harbor were in general a common highway for the public use of all her Majesty's subjects, but in the course of time persons owning land on the waterside had, by the erection of wharves and platforms for the purposes of their trade and a long exclusive use of the adjacent waters acquired a right to the same within reasonable limits and an easement to their land. Both the parties to the cause appeared to rest their claim on this ground, and the plaintiff professed to limit his claim to the water opposite his land, while the defendant's case was that for upwards of forty years he and those under whom he derived had enjoyed the exclusive use of the waters east of his wharf and extending in some degree in front of the plaintiff's land. There was much evidence to support that position; on the other hand there was evidence to shew that the plaintiff and those under whom he claimed had in the course of a more limited business than the extensive trade carried on on the defendants' premises, used from time to time the water opposite or in front of the plaintiff's land, and perhaps the jury would not think the rights of either party ought to be affected by the magnitude or otherwise of their trade if a constant user of the water were clearly shown. (He would read the evidence at large to the jury if they wished, but the jury having intimated that they had a clear recollection of the evidence, the learned judge, after some observations upon the general effect of the testimony on both sides, left the case to the jury upon the following points): Has the plaintiff or those he claims under for twenty years or upwards had the use of the waters near, to, and in front of his land, and has defendant disturbed him and prevented his use of that water? and if so, they would find for the plaintiff. If the defendant has had the exclusive use of the water east of his wharf for at least one vessel in width, and that Cole's vessel (as placed under plaintiff's direction) prevented defendant's exercise of that right, then the jury would find a verdict for the defendants. But if the jury believe the evidence that the defendants' wharf had within twenty years

been extended further into the harbor beyond the former bounds, and if that had straightened and narrowed the passage so as to cause insufficient room between such wharf and Cole's vessel, the jury would take that into their consideration and dispose of the second point, as such extension would be not only a public nuisance, but would account for the deficiency of space on which the defendant rested his demand to have Cole's vessel removed. If the jury found for plaintiff they would give such moderate damages as under all circumstances they thought plaintiff entitled to.

The jury retired about 8 p. m., and not having agreed by 11 p. m., were locked up the night, and on the following morning were discharged, being unable to agree.

Mr. Carter, Q. C., for plaintiff.

Mr. Hoyles, Q. C., and *Mr. Little* for defendant.

MARCH v. BARTLETT.

1860, *January*. HON. MR. JUSTICE DES BARRES.

Shipping—Collision—Contributory negligence—Projection of jib-boom over public waters.

In an action for damages, where the plaintiff's vessel whilst moored to his wharf, was run into and injured by the defendant's vessel, the judge trying the case told the jury it was no defence that the jib-boom of plaintiff's vessel projected over the public waters of the harbor.

Plaintiff's case.—His vessel the *Corsair* was fastened broad-side to his wharf on the north side; the day was fine and a good working breeze when the defendant's vessel, beating in the harbor, instead of coming about where she ought, came in too close and ran into plaintiff's vessel, breaking her jib-boom, and destroying some of her rigging. The cost of repair was seven pounds. Defendant apologized at the time, and promised to pay what was reasonable, but afterwards denied his liability and the action was brought. Plaintiff had offered by way of settlement to take five pounds, but defendant would only consent to give three.

Plaintiff and Captain Cook of the *Corsair* were then called and sworn.

Defence.—1st, that it was plaintiff's fault, as his vessel's bow and jib-boom were projecting on the public waters of the harbor; 2nd, that at all events the plaintiff contributed to the accident, and the law in such case made each party pay his own damage; 3rd, that the accident was unavoidable as a flaw took the vessel as she was in irons; 4th, that three pounds had been paid into Court which was full value of the damage sustained, new had been substituted for old.

Defendant and his witnesses were then called and sworn.

In the examination of Captain Cook for the plaintiff, it came out in evidence on the re-examination that in proceeding out of the narrows on a voyage to Sydney, a few days after the accident, his top-gallantmast broke off, that previously to the accident it had been sound.

Mr. Robinson objected to such evidence going to the jury, it had not formed part of the plaintiff's case in opening, there was no sufficient proof of the connection of this damage with the accident. It was given in evidence on the re-examination and not in chief.

Mr. Hoyles contra.

By the Court.—The evidence is sufficient to go to the jury, but there did not seem to be much in it.

Mr. Hoyles closed.

Judge Des Barres directed the jury that there was nothing in the defence, that the plaintiff's vessel was on the public waters. She was lying there in the usual course of business, and had the right of pre-occupation. There appeared to be nothing in the defence of unavoidable accident; the defendant's vessel had come in too close or it would not have happened. The plaintiff had not contributed to the damage, for his vessel was lying as she lawfully might, securely at the wharf. The question was one of damages, and they could not do better than take the disinterested evidence of Captain Cook who said it would be from five to six pounds. As to the damage to the top-gallantmast, his lordship thought that the evidence upon that point was deficient, the damages might have arisen from other causes. Three pounds had been paid into Court, if they found that the damage did not exceed that sum, there should be a verdict for defendant. If on the contrary, the damage was greater, they should give a verdict for the plaintiff. Ver-

dict for the plaintiff—five pounds, exclusive of the three pounds paid into Court.

Mr. Hoyles, Q. C., for plaintiff.

Mr. Robinson, Q. C., for defendant.

CURTIS v. BOWRING BROTHERS.

1860, *January*. BRADY, C. J.; LITTLE, J.; ROBINSON, J.

Practice—New trial—Contract, breach—Setting aside verdict—Excessive damages.

Before assenting to setting aside the verdict of a jury on the grounds of excessive damages, the Court will require to be satisfied that the damages are really excessive and not sustained by evidence.

It must appear from the amount of damages as compared with the facts of the case laid before the jury, that the jury acted under the influence either of undue motives or of some gross error or misconception on the subject. The case must be very gross and the damages enormous for the Court to interpose; and in a case of uncertain damages a new trial will not be granted, because if the Court had to fix damages they might have given less.

HON. MR. JUSTICE ROBINSON :

THIS is an action in assumpsit brought by the plaintiff to recover from the defendants, who were his supplying merchants, damages for the breach of an agreement.

The agreement which was broken is as follows :—

Memorandum of agreement between William Curtis and Bowring Brothers.

Bowring Brothers hereby agree to give William Curtis the brigantine *Giraffe* to clear for the sum of thirteen hundred pounds, currency, as she was received from Messrs. Clift, Wood & Co. Said Bowring Brothers agree to give said Wm. Curtis four years to clear said vessel, always provided that he acts to their satisfaction, and to supply for the cod and seal fisheries (with the same proviso) for the same time. Said Wm. Curtis agrees to pay said Bowring Brothers six per cent. interest on any balance due from the vessel on 31st December, 1858, and

the same percentage until the vessel is clear on each successive 31st December.

BOWRING BROTHERS.
WILLIAM CURTIS.

St. John's, 31st December, 1857.

In May last the plaintiff was deeply in debt to the defendants, and they, marking the continuing outlay required, and the illness which attended the plaintiff, and, as they thought, the hopelessness of his clearing the vessel within the remaining period prescribed in the agreement, determined to take the *Giraffe* from the plaintiff, which they accordingly did in May and put another master in her—for which violation the plaintiff brought the present action.

At the trial an objection was taken by Mr. Carter, Q. C., on behalf of the defendants, that the action was not maintainable because the plaintiff had no valid title to the *Giraffe*, in consequence of the conveyance respecting her not being in conformity with the Registry Act of 17 or 18 Vic.; but I am of opinion that, so far as this action is concerned, the Registry Act does not apply, because the right of the plaintiff to the conditional use, not to the ownership, of the vessel was that was involved.

Another objection taken for the defendants was that the words in the agreement that the dealings of the plaintiff should be to "the satisfaction of the defendants," vested a discretionary power in them to terminate those dealings whensoever they pleased, although the plaintiff may have conducted himself properly; but I do not think that such an arbitrary power is conveyed by such words or that the meaning of the parties was that such an unilateral authority should be committed to the defendants.

It appears that the defendants drew the agreement in their own office, and if they neglected to insert proper stipulations necessary to protect themselves against the events that were likely to arise during such a protracted period, they have no one to blame but themselves; they had no right to obviate the effects of their own want of foresight by breaking with a strong hand a solemn agreement, and I therefore think the plaintiff is clearly entitled to some damages and to final judgment, and in this opinion I am fortunate enough to find that my brother judges concur, but I cannot acquiesce with them in the opinion that the verdict of the jury should not be disturbed, because

I think the amount they have awarded is excessive, and is not supported by any proper view of the evidence.

It is undoubtedly true that the jury are the proper judges of damages, but their verdict must be based upon and supported by the evidence. It is equally true that it is the province of the Court, and is no unimportant part of their duty to restrain within legal limits the functions of juries. The Court may in any case grant a new trial upon the ground of excessive damages.—*Dueller vs. Ward*, 1 Sk. 277. And there is no species of action in which the Court will not grant a new trial for excessive damages if the circumstances should require it.

The agreement between the parties in this case is certainly loose and vague to a remarkable degree, considering the amount of property involved, but the fair meaning of the parties under it was that if the plaintiff, by his industry, good management and good fortune, should be enabled within the period of four years to pay for the vessel and all the supplies he should take from the defendants, the vessel should then become his property. The vessel when new cost £1,300 cy., and was increased in value by her outfit to about £2,000; the principal source from which the plaintiff hoped to earn sufficient to pay for the vessel and supplies was the seal fishery. During the three years she had been at the ice she had been very unfortunate; the first year she took but 300 seals, the second year but 90, and last year she had but 784 seals, and, with only one more sealing voyage remaining, she was, in June, 1860, in debt to the defendants in the sum of £2,854.

It is plain that the plaintiff would be entitled to substantial damages for breach of the agreement in taking from him the *Giraffe* only on the consideration that the vessel might, in reasonable probability, have been cleared by the 31st December, 1861, so as to become his property at that time, and it is because the strongest improbability short of an actual impossibility of the plaintiff so clearing the vessel was shewn by the evidence, that I think the damages of £200 for taking her away from him are altogether excessive.

It must be borne in mind that the damages here are in an action *ex contractu*, and there existed the same latitude given to juries in estimating damages in such actions as in those *ex delicto*.

The rule by which damages in breaches of contract are to be calculated is, that the defendant is entitled to be put in the same position as if the breach of contract had not been com-

mitted—*Brandt v. Boulty; Alder v. Keighley*, 15 M. W. 117; 2 B. & Ad., 932. The damages in breach of contract should be the proximate, not the remote, consequences of the Act, and Mr. Justice Story states that damages should be a calculation, not upon conjectures, but upon facts, and that an allowance of damages upon the basis of remote and possible profits is inadmissible—*Brom, L. M.*, 78. Possible profits, which are a mere contingent damage, are not the measure of damages on a breach of contract—*Story on Agency*, §. 220.

I would give to the plaintiff here the fullest benefit of the evidence. I would, in considering his right to damages against the merchant who wilfully violated his contract, not be unwilling to allow him probable proximate profits in a liberal, nay, in a sanguine spirit, more sanguine. I doubt not, than any merchant would be found to advance his capital upon, and yet, after doing so, I find that the plaintiff in December, 1861, would still be largely in debt to the defendants, as the following figures taken from evidence will shew a debt and credit formed—

To present debt, allowing for coals on board ...	£2,853	0	0
" Probable outfits for summer in 1860 ...	100	0	0
" Probable outfits for ice in 1861, as sworn to.	500	0	0
" Probable outfits for summer, 1861	100	0	0
	<hr/>		
	£3,554	0	0

CR.

By profits of summer, 1860 ...	£ 175	0	0
" 4,000 seals in 1861, 12s 2d ...	1,216	0	0
" Profits of summer, 1861 ...	175	0	0
" Value of vessel, on average of all the witnesses in Decem- ber, 1861	1,000	0	0
	<hr/>		
	£3,166	0	0
Leaving a balance of debt against defendant in December, 1861	£388	0	0

In the above calculation the plaintiff gets credit for 4,000 seals in 1861, which is all he pretended to himself, which pretence is trenching upon the principle above stated, and which is going a very long way, considering that the average

of his own catch for three years in the *Giraffe* was only 392 seals, the average of all Bowring's vessels for seven last years was only 1,480, and the average of all the vessels in the trade for the five last years was only 1,375 seals. I am, therefore, constrained to say that I think the jury had no authority from the evidence for giving such a verdict as £200 damages; the province of a jury is to determine upon disputed facts, but it would be a very dangerous power to invest them with such speculative damages as they pleased in actions *ex contractu*.

I, therefore, feel that, as a matter of abstract justice and law, I am constrained to say that in my judgment the verdict ought to be set aside and a new trial granted on the ground of excessive damages.

HON MR. JUSTICE LITTLE:

In this cause a rule has been obtained to arrest the judgment or for a new trial on various grounds.

After the most careful consideration of the evidence and the points of objection to the verdict raised by the learned counsel for the defendants, I am of opinion that in point of law the jury could not have done otherwise than find a verdict for the plaintiff. As to the amount of damages they have given, whether they are excessive or not, that is a matter on which there may fairly exist a difference of opinion even concerning ourselves; but before I should feel myself warranted in assenting to set aside the verdict of the jury, I should be satisfied that the damages are really excessive and not sustained by evidence. And, according to *Mayne on Damages*, p. 347: "It must appear from the amount of damages, as compared with the facts of the case laid before the jury, that the jury acted under the influence either of undue motives or of some gross error or misconception on the subject. And in a case of uncertain damages, where matters have been left properly for all the parties to the sound discretion of the jury, on a subject of which they are competent and proper judges, a new trial will not be granted, because if the Court had to fix damages they might have given less. The case must be very gross and the damages enormous for the Court to interpose."—6 *East*, 256, *Leffl.* 771, 3 *Wils.* 63.

It appeared that in October, 1857, the plaintiff being a sealing master and having a sum of money (about £380) to advance towards the purchase of a vessel, he paid that sum to

mitted—*Brandle v. Boulty; Alder v. Keighley*, 15 M. W. 117; 2 B. & Ad., 932. The damages in breach of contract should be the proximate, not the remote, consequences of the Act, and Mr. Justice Story states that damages should be a calculation, not upon conjectures, but upon facts, and that an allowance of damages upon the basis of remote and possible profits is inadmissible—*Brom, L. M.*, 78. Possible profits, which are a mere contingent damage, are not the measure of damages on a breach of contract—*Story on Agency*, S. 220.

I would give to the plaintiff here the fullest benefit of the evidence. I would, in considering his right to damages against the merchant who wilfully violated his contract, not be unwilling to allow him probable proximate profits in a liberal, nay, in a sanguine spirit, more sanguine, I doubt not, than any merchant would be found to advance his capital upon, and yet, after doing so, I find that the plaintiff in December, 1861, would still be largely in debt to the defendants, as the following figures taken from evidence will shew a debt and credit formed—

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“ Probable outfits for summer, 1861	...	100	0	0
		<hr/>		
		£3,554	0	0

Cr.

By profits of summer, 1860	..	£ 175	0	0
“ 4,000 seals in 1861, 12s. 2d....		1,216	0	0
“ Profits of summer, 1861	...	175	0	0
“ Value of vessel, on average of all the witnesses, in Decem- ber, 1861	1,600	0	0
		<hr/>		
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Leaving a balance of debt against defendant in December, 1861	£388	0	0
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of his own catch for three years in the *Giraffe* was only 392 seals, the average of all Bowring's vessels for seven last years was only 1,480, and the average of all the vessels in the trade for the five last years was only 1,375 seals. I am, therefore, constrained to say that I think the jury had no authority from the evidence for giving such a verdict as £200 damages; the province of a jury is to determine upon disputed facts, but it would be a very dangerous power to invest them with such speculative damages as they pleased in actions *ex contractu*.

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HON MR. JUSTICE LITTLE:

In this cause a rule has been obtained to arrest the judgment or for a new trial on various grounds.

After the most careful consideration of the evidence and the points of objection to the verdict raised by the learned counsel for the defendants, I am of opinion that in point of law the jury could not have done otherwise than find a verdict for the plaintiff. As to the amount of damages they have given, whether they are excessive or not, that is a matter on which there may fairly exist a difference of opinion even concerning ourselves; but before I should feel myself warranted in assenting to set aside the verdict of the jury, I should be satisfied that the damages are really excessive and not sustained by evidence. And, according to *Mayne on Damages*, p. 347: "It must appear from the amount of damages, as compared with the facts of the case laid before the jury, that the jury acted under the influence either of undue motives or of some gross error or misconception on the subject. And in a case of uncertain damages, where matters have been left properly for all the parties to the sound discretion of the jury, on a subject of which they are competent and proper judges, a new trial will not be granted, because if the Court had to fix damages they might have given less. The case must be very gross and the damages enormous for the Court to interpose."—6 *East*, 256, *Left*. 771, 3 *Wils*, 63.

It appeared that in October, 1857, the plaintiff being a sealing master and having a sum of money (about £380) to advance towards the purchase of a vessel, he paid that sum to

the defendants, and they entered into an agreement with him to give him the brig *Giraffe*, to clear in four years, for £1,300, and to supply him for the seal and cod fisheries for that time, with a promise that he should act to their satisfaction. The vessel was fitted out for the seal fishery, and on going to the ice on her first trip, as she then stood and was valued by the Brigus Insurance Club, her cost was about £2,200. The plaintiff, it was understood, was to command the vessel, and did so, in fact. For the three years that she went to the seal fishery she was unfortunate and continued to sink money, without any fault, however, on the part of the plaintiff, but owing to the want of success, which not unfrequently attends the best directed energies in that somewhat precarious, yet not unfrequently highly remunerative enterprise. The balance against her at the end of 1859 was £2,647 0s. 4d.; and up to the time of the trial, Mr. John Bowring stated it to be then £3,121 19s. 4d., less a cargo of coals on board. On arriving from the ice last spring, the plaintiff was informed that he was to go to Sydney for a load of coals, but Mr. Bowring changed his intention, and told the plaintiff he should put another captain in the vessel and relieve him from his liability on the contract. To this the plaintiff objected, and the defendants admitted they had no reason to be dissatisfied with him but for being unfortunate at the seal fishery. The vessel was then taken from the plaintiff and sent to Sydney in charge of another master. The plaintiff thereupon brought this action to recover damages for being turned out of the vessel in the manner stated, and deprived of the use of her and her earnings for the remaining eighteen months to run, until the expiration of the four years for which he was to have the use of her to enable him to clear her. On the trial he brought forward several sealing masters of judgment and experience, who proved that they had brought in from the seal fishery trips varying from 9 000 seals downwards to a small number—that 4,000 or 5,000 seals a trip are not uncommon; while this evidence was met on the other side by an average statement of the trips brought in to defendants from 1853, when it was stated to be 1,628 seals, down to 1860, when it was 1,397 seals per vessel; while the general average of the trade was stated at 1,106 seals in 1856, varying each year after. In 1860 it was said to be 1,286 per vessel, and the price this year was stated to be 12s. 2d. a seal. In addition to this evidence the plaintiff shewed the probable value of a vessel's summer employment, and the present value of the vessel.

was variously estimated at £1,100 to £1,300 by defendants, and £1,700 to £1,800 by plaintiff's evidence. The case was then left to the jury to say whether the defendants had or had not broken their agreement by taking away the vessel and putting another master in charge of her, and, if they had, they were directed to inquire what damages the plaintiff had thereby sustained over the amount of defendant's account, placing that amount on one side of the account, and on the other the fair value of the vessel (less her wear and tear), and her probable net earnings from the date of plaintiff's taking her from defendants to the end of the four years, including the proceeds of coal on board, less wages due seamen. If no damage sustained over defendants' claim, then a verdict should be given for them, unless the jury should be of opinion that the defendants broke the agreement by turning plaintiff out of the vessel and putting another master in charge—which, in point of law, would seem to be a breach of it, and in that case they would find nominal damages for the plaintiff. The correctness of that charge has not been questioned—the jury found a verdict for the plaintiff for £200. It is evident from the result that the jury came to the conclusion that the plaintiff had sustained substantial damages by the breach of the contract on the part of the defendants. I cannot exactly say upon what particular estimate they make up their verdict. There was evidence before them, though of a conflicting character, to justify them in awarding substantial damages; and I do not feel that we should be justified in disturbing their finding, simply because I should probably have awarded less if I had the power to fix damages, and it must clearly appear that the damages are enormous before we can disturb their verdict. If there is evidence to shew that they are excessive, there is likewise evidence on the other side to support the verdict. The estimate was necessarily, from the nature of the case, of a speculative character, and how can I therefore say it "clearly appears" the damages were enormous? I shall refer to one important decision in support the right of the jury to give prospective damages for a breach of contract, in a somewhat similar case to the present. In *Richardson v. Millish*, 2 Bing., R. 230, the plaintiff claimed compensation for prospective damages in being deprived of the profits he would probably have realized as master of an East Indiaman, for two voyages, under an agreement with the defendant as owner. He had previously commanded her under the same contract, and required to be

reinstated in his command according to the terms thereof; but the defendant having declined to comply with his request, and having sold the ship, the plaintiff brought an action of damage for his loss, and the jury gave damages for the loss of the two remaining damages though the second had not been accomplished at the time of the action. The proof given at the trial of the value of one of these voyages consisted of the testimony of several captains, who described it as being worth from £4,000 to £8,000 a voyage, and in the production of a book containing a list of passengers, made by the captain and deposited in the India house. The judge directed the jury that they were at liberty to give damages for the two voyages remaining to be performed when the plaintiff demanded the fulfilment of the agreement. They assessed the damages at £7,500. Upon a motion afterwards made before the Court of Common Pleas for a new trial, Chief Justice Best in affirming the finding of the jury, says, "I am clearly of opinion that Lord Gifford was strictly warranted in telling the jury they might take into their consideration, that by the breach of this agreement the plaintiff had been not only clearly prevented going the first voyage, but in all probability going the second; and therefore in making up their minds on the damages, they ought to take into their consideration that which he might have lost from the second. If my Lord Gifford had not told them so I should have thought a new trial ought to be granted, for he would not have presented the case to the jury in a manner that would enable the plaintiff to recover all that he was in justice entitled to. This case has been likened to the case of stipulated payments at different times; there undoubtedly a new cause of action arises; but here the cause of action is complete, for the whole thing has but one neck, and that neck was cut off by one act of the defendant, which entitled the plaintiff to maintain this action. It would be most mischievous to say, it would be increasing litigation to say, you shall not have all you are entitled to in your first action, but you shall be driven to bring a second, a third, or a fourth action."

I have confined my observations mainly to the important point of damages; as to the other points stated in the rule, I do not think they have any legal force in them. We may observe, as to that part of the agreement which stated that the plaintiff should act to the satisfaction of the defendants, that it did not give the plaintiff the right they contended for, of turning the plaintiff off and terminating the agreement on his

being unfortunate; that would be a very unjust construction, and in the seal fishery, where a man may be very unfortunate one spring and very fortunate the next, it is not borne out by a regard to the circumstances of the case. The plaintiff was admitted to have acted honestly and to the best of his abilities, and in this way I consider that he complied with that condition. For these reasons I think the rule should be discharged.

HON. SIR F. BRADY, C. J. :

In this case I am of opinion that we ought not to disturb the verdict of the jury, and I, therefore, concur with my brother Judge Little that the rule for that purpose ought to be discharged. The only grounds relied upon for a new trial which gave us any difficulty are, first, that the jury were not warranted by law in giving prospective damages for the losses the plaintiff might have sustained by being deprived of the use of the vessel for the period agreed upon, but I am satisfied, after a full consideration of the authorities, that the evidence upon that part of the case, which was conflicting, was properly received, and that the jury had a right to take that evidence into their consideration in estimating damages they would award. The second ground was that the damages were excessive, while it is conceded that the plaintiff should have a verdict for some amount. In *Gilbert vs. Birkinsham, Loft. 771, Cowp. 230*, the law is thus laid down: "The jury are the proper judges of damages, and when they have once decided the Court will not in general disturb their verdict"; and in *Day vs. Holloway, 1 Jurist, 794*, that "Where there is no certain measure of damages the Court will not in general disturb a verdict." Upon these grounds I do not feel warranted in interfering with the verdict had in this case. Independent of these authorities I must consider *cui bono* set this verdict aside, which could only be done upon the terms that the defendants should pay the plaintiff the costs of the former trial, in a case in which there is no imputation upon the jury, and it is admitted the jury at any future trial must find a verdict for the plaintiff, and in which we have no ground for believing that the damages would be reduced, and when the result might be that they would be increased.

Mr. Hoyles, Q. C., for plaintiff.

Mr. F. B. T. Carter, Q. C., for defendants.

Plaintiff and Captain Cook of the *Corsair* were then called and sworn.

Defence.—1st, that it was plaintiff's fault, as his vessel's bow and jib-boom were projecting on the public waters of the harbor; 2nd, that at all events the plaintiff contributed to the accident, and the law in such case made each party pay his own damage; 3rd, that the accident was unavoidable as a flaw took the vessel as she was in irons; 4th, that three pounds had been paid into Court which was full value of the damage sustained, new had been substituted for old.

Defendant and his witnesses were then called and sworn.

In the examination of Captain Cook for the plaintiff, it came out in evidence on the re-examination that in proceeding out of the narrows on a voyage to Sydney, a few days after the accident, his top-gallantmast broke off, that previously to the accident it had been sound.

Mr. Robinson objected to such evidence going to the jury, it had not formed part of the plaintiff's case in opening, there was no sufficient proof of the connection of this damage with the accident. It was given in evidence on the re-examination and not in chief.

Mr. Hoyles contra.

By the Court.—The evidence is sufficient to go to the jury, but there did not seem to be much in it.

Mr. Hoyles closed.

Judge Des Barres directed the jury that there was nothing in the defence, that the plaintiff's vessel was on the public waters. She was lying there in the usual course of business, and had the right of pre-occupation. There appeared to be nothing in the defence of unavoidable accident; the defendant's vessel had come in too close or it would not have happened. The plaintiff had not contributed to the damage, for his vessel was lying as she lawfully might, securely at the wharf. The question was one of damages, and they could not do better than take the disinterested evidence of Captain Cook who said it would be from five to six pounds. As to the damage to the top-gallantmast, his lordship thought that the evidence upon that point was deficient, the damages might have arisen from other causes. Three pounds had been paid into Court, if they found that the damage did not exceed that sum, there should be a verdict for defendant. If on the contrary, the damage was greater, they should give a verdict for the plaintiff. Ver-

dict for the plaintiff—five pounds, exclusive of the three pounds paid into Court.

Mr. Hoyles, Q. C., for plaintiff.

Mr. Robinson, Q. C., for defendant.

CURTIS v. BOWRING BROTHERS.

1860, *January*. BRADY, C. J. ; LITTLE, J. ; ROBINSON, J.

Practice—New trial—Contract, breach—Setting aside verdict—Excessive damages.

Before assenting to setting aside the verdict of a jury on the grounds of excessive damages, the Court will require to be satisfied that the damages are really excessive and not sustained by evidence.

It must appear from the amount of damages as compared with the facts of the case laid before the jury, that the jury acted under the influence either of undue motives or of some gross error or misconception on the subject. The case must be very gross and the damages enormous for the Court to interpose ; and in a case of uncertain damages a new trial will not be granted, because if the Court had to fix damages they might have given less.

HON. MR. JUSTICE ROBINSON :

THIS is an action in assumpsit brought by the plaintiff to recover from the defendants, who were his supplying merchants, damages for the breach of an agreement.

The agreement which was broken is as follows :—

Memorandum of agreement between William Curtis and Bowring Brothers.

Bowring Brothers hereby agree to give William Curtis the brigantine *Giraffe* to clear for the sum of thirteen hundred pounds, currency, as she was received from Messrs. Clift, Wood & Co. Said Bowring Brothers agree to give said Wm. Curtis four years to clear said vessel, always provided that he acts to their satisfaction, and to supply for the cod and seal fisheries (with the same proviso) for the same time. Said Wm. Curtis agrees to pay said Bowring Brothers six per cent. interest on any balance due from the vessel on 31st December, 1858, and

the same percentage until the vessel is clear on each successive 31st December.

BOWRING BROTHERS.

WILLIAM CURTIS.

St. John's, 31st December, 1857.

In May last the plaintiff was deeply in debt to the defendants, and they, marking the continuing outlay required, and the illness which attended the plaintiff, and, as they thought, the hopelessness of his clearing the vessel within the remaining period prescribed in the agreement, determined to take the *Giraffe* from the plaintiff, which they accordingly did in May and put another master in her—for which violation the plaintiff brought the present action.

At the trial an objection was taken by Mr. Carter, Q. C., on behalf of the defendants, that the action was not maintainable because the plaintiff had no valid title to the *Giraffe*, in consequence of the conveyance respecting her not being in conformity with the Registry Act of 17 or 18 Vic.; but I am of opinion that, so far as this action is concerned, the Registry Act does not apply, because the right of the plaintiff to the conditional *use*, not to the *ownership*, of the vessel was that was involved.

Another objection taken for the defendants was that the words in the agreement that the dealings of the plaintiff should be to "the satisfaction of the defendants," vested a discretionary power in them to terminate those dealings whensoever they pleased, although the plaintiff may have conducted himself properly; but I do not think that such an arbitrary power is conveyed by such words or that the meaning of the parties was that such an unilateral authority should be committed to the defendants.

It appears that the defendants drew the agreement in their own office, and if they neglected to insert proper stipulations necessary to protect themselves against the events that were likely to arise during such a protracted period, they have no one to blame but themselves; they had no right to obviate the effects of their own want of foresight by breaking with a strong hand a solemn agreement, and I therefore think the plaintiff is clearly entitled to some damages and to final judgment, and in this opinion I am fortunate enough to find that my brother judges concur, but I cannot acquiesce with them in the opinion that the verdict of the jury should not be disturbed, because

I think the amount they have awarded is excessive, and is not supported by any proper view of the evidence.

It is undoubtedly true that the jury are the proper judges of damages, but their verdict must be based upon and supported by the evidence. It is equally true that it is the province of the Court, and is no unimportant part of their duty to restrain within legal limits the functions of juries. The Court may in any case grant a new trial upon the ground of excessive damages.—*Dueller vs. Ward*, 1 Sk 277. And there is no species of action in which the Court will not grant a new trial for excessive damages if the circumstances should require it.

The agreement between the parties in this case is certainly loose and vague to a remarkable degree, considering the amount of property involved, but the fair meaning of the parties under it was that if the plaintiff, by his industry, good management and good fortune, should be enabled within the period of four years to pay for the vessel and all the supplies he should take from the defendants, the vessel should then become his property. The vessel when new cost £1,300 cy., and was increased in value by her outfit to about £2,000; the principal source from which the plaintiff hoped to earn sufficient to pay for the vessel and supplies was the seal fishery. During the three years she had been at the ice she had been very unfortunate; the first year she took but 300 seals, the second year but 90, and last year she had but 784 seals, and, with only one more sealing voyage remaining, she was, in June, 1860, in debt to the defendants in the sum of £2,854.

It is plain that the plaintiff would be entitled to substantial damages for breach of the agreement in taking from him the *Giraffe* only on the consideration that the vessel might, in reasonable probability, have been cleared by the 31st December, 1861, so as to become his property at that time, and it is because the strongest improbability short of an actual impossibility of the plaintiff so clearing the vessel was shewn by the evidence, that I think the damages of £200 for taking her away from him are altogether excessive.

It must be borne in mind that the damages here are in an action *ex contractu*, and there existed the same latitude given to juries in estimating damages in such actions as in those *ex delicto*.

The rule by which damages in breaches of contract are to be calculated is, that the defendant is entitled to be put in the same position as if the breach of contract had not been com-

wife should have the use of the said land during their natural lives.

The defendant resists John's claim on the ground that the property is only a chattel real, and not being the subject of an entail, vested absolutely in Mary Evans, and goes to her executor for distribution under her will. For the purposes of this case, I may concede that the words of limitation used in the words of Joseph Butler, if referring to reality, would vest in Mary Evans an estate for life, with remainder in fee to her eldest son, who is the present plaintiff, and who therefore would be entitled to the possession of the whole property, and to our judgment, if the law of primogeniture, as it affects real estate, were in force in Newfoundland.

I cannot find that lands in this colony have ever been adjudged realty. It has been stated that some judges of our courts, whose opinions are entitled to much respect, have expressed *obiter dicta* that the law of primogeniture *ought* to have been considered in force here, but no *decision* to that effect has been cited, whilst I find that in 1792 (only four years before this deed was made) Chief Justice Reeves solemnly determined, in the case Kennedy v. Tucker, that lands in Newfoundland were chattels, and were divisible amongst all the next of kin; and in 1818, Chief Justice Forbes, in the case Williams v. Williams, determined the same point in the like manner. The latter case, in most of its circumstances, closely resembles the present. The grandfather there gave his house, &c., to his daughter and her heirs. John Williams, her eldest son, claimed the whole estate as heir at law; John's brothers denied that lands here descended to the eldest son as heir to realty, but were divisible amongst all the children as personalty, thus raising the very question that is involved in the present case. And Sir Francis Forbes, without being aware of the prior decision of Mr. Reeves, determined the case in the same way as Mr. Reeves had done. And these ancient decisions upon a question of such importance, and which would necessarily influence the transmission of property, should not lightly be set aside, for surely nothing can be of greater importance to the peace of society than that the rules which govern the disposition of property should be settled, and not fluctuating.

In addition to these two former judgments, which were not appealed against, and have not, so far as I can ascertain, been overruled, are the facts, as stated by Mr. Archibald in his Digest, that no claim for dower has ever been urged on lands

in this colony, and that in no instance has a will conveying lands been questioned in our courts for want of three witnesses which the Statute of Frauds rendered indispensable for the valid devise of real estate, although that statute has, as regards its other provisions, been always recognised as operative in this colony. So far, the weight of authorities seems to be in favor of the view that lands here have been deemed chattels; but as doubts still existed upon the subject, the Colonial Act, 4 Wm. 4, c. 18, was passed in the year 1834, to remove them. In the preamble it declares "that the law of primogeniture, as it affects real estate, is inapplicable to the condition and circumstances of the people of this colony," and such a legislative declaration tends to support the early decisions of our courts, inasmuch as the common law of England is in force in a colony settled by occupancy, "*only so far as it is applicable to its condition.*"—Clark 8.

The Act then goes on to enact "that all lands which by the common law are regarded as real estate, shall in all courts of justice be held to be chattels real, and shall go to the executor or administrator as other personal estate now passes to the personal representative;" and the second section enacts "that all rights or claims which have heretofore accrued in respect to any lands or tenements in Newfoundlaud, and have not already been adjudicated upon, shall be determined *according to the provisions of the Act*"

Irrespective, therefore, of the state of the law before the passing of the above-mentioned Act, the present case seems to come within the terms of the statute. If the plaintiff's interest in the land in question only amounted to a right or claim which had accrued at the time of the passing of the Act, and had not been adjudicated upon (as is the case here) it comes under the operation of the second section, and must be deemed a chattel which is not the subject of an entail, whilst if his right had not then accrued, but only arose in 1858, on the death of his mother, then his case is met and governed by the general enactment of the first section. It has, however, been urged that although John Evans only became entitled to the permanency of the profits of the estate in 1853, yet his interest in remainder had vested in him upon the inception of the particular estate of his mother, and that the possession of the tenant for life was by construction of law the possession in remainder, by virtue of which such remainder might be considered as coming within the proviso to the second section, "that

nothing herein contained shall extend to any right, title or interest to land derived by descent, and reduced into possession before the passing of this Act."

In the first place that argument amounts to a *petitio principii*, it is based upon the assumption of the fact at issue, viz.:—that lands here were realty, for a chattel is not the subject of an entail; on the death of the owner it belongs to his executors, and does not descend to the heir.—*2 Step, com 269*. And the interest which in case of realty would be an estate tail, will become, as regards a chattel, the absolute property of the first taker, divested of any condition.—*2 Bl. com., G. Coleridge, 398*. There is a marked difference between an interest and the possession of that interest; and such a doctrine of constructive possession would confound the distinctions which the law recognises between "estates in possession and estates in expectancy."—*2 Bl. com.* Moreover I think it is hard to say that the plaintiff's claim was reduced to possession before the year 1834, when the present action brought by him to get possession, and a perusal of the whole Act, and a fair consideration of the objects of the Legislature shew, in my mind, that the possession referred to in the proviso of the second section, was and is intended to be an actual possession in fact, and not a constructive possession in law, even supposing a constructive possession were applicable to a remainder in fee expectant upon an estate of freehold.—*Watkins on Descent*. And lastly, it is doubtful that the property is derived to John Evans "by descent," for to bring it within the proviso, that particular mode of transmission must concur with the reduction into possession. It is laid down in Coke's Institutes, and in Lord Raymond, 728, that "a man who has his parent's estate settled upon him in tail before he was born, takes by purchase and not by descent." I am aware of the rules in Shelly's case, which operates as an exception, but without being under the necessity of determining that most intricate point, I am of opinion that the land described in the deed of Joseph Butler, and of which Mary Doyle died possessed, should be deemed a chattels estate; that she must be held to have taken it absolutely, and divested of the limitation of the deed, and that the testamentary disposition of it which she has made, should be upheld. I therefore think judgment should be given for the defendants.

MR. JUSTICE LITTLE:

In this case I am of opinion after a careful consideration of the important points raised for our decision, that the lessor of the plaintiff is entitled to recover. In the first place it has been already solemnly decided by this case in a somewhat similar case to the present, I refer to Walbank, Administrator of Ellis v. Ellis, that the laws of primogeniture, as they existed in England, were in force in this colony until the Real Chattels Act was passed in 1834, and consequently that lands in this island in fee-simple were before then rightly regarded as real estate. In expressing my concurrence in that decision, I believe it to be supported by the highest authorities.

The deed of gift from Joseph Butler to his daughter Mary Butler, afterwards Doyle, made on the 17th July, 1786, and under which she was nearly fifty years in possession of the land thereby conveyed, must, in my opinion, be construed by a regard to the old law. Hence, by the express limitation therein contained, Mary Evans and "the heirs of her body lawfully begotten," she took an estate tail general, and John Evans, the lessor of plaintiff, as her eldest son and heir at law, as estate in remainder, in the land thereby conveyed and sought to be recovered by him in this action.

The proviso to the last section of the Real Chattels Act, according to my view, excepts such cases as the present from coming under the general provisions of that Act, which converted lands in this colony into Chattels Real, and therefore altered the laws applicable to them in many respects, but at the same time saved vested rights in the following words of that proviso: "*Provided always that nothing herein contained shall extend to any right, title, or claim to any lands, tenements, or heriditaments derived by descent and reduced into possession before the passing of this Act.*"

Now, there can be no doubt under the authority of Shelly's case (Co., 98, and 2 Preston on estates, 375) that John Evans derived the land in question "by descent" under the limitation to "her and the heirs of her body lawfully begotten." The next and only difficult question in the case, and the one upon which I own I entertained considerable doubt for a time is this: Was this land "reduced into possession by the lessor or plaintiff before the passing of this Act?" This is assuming that such possession of the land and not merely of "a right, title, or claim" to it in the claimant was required by the pro-

viso, which, it may be said, is not very clear, or why use the "claim" after the terms "right title." If the claimant were in possession of the land, it may be urged, what was previously a "claim" would then be a "right" or "title." But assuming that the proviso required the land to be reduced into his possession, although John Evans had not the actual occupation of it during his mother's lifetime, yet in law, the possession of it by her as tenant in full, was his possession, for her estate tail and his estate in remainder formed but one estate in law, and were both vested in her and him before the Real Chattle Act was passed; consequently, as a vested estate in him, it comes within the exception or proviso of the Act, and is subject to the general laws of inheritance as they stood before the passing of that Act.

It is laid down in Step., Com. 298, that the same livery which conveys the estate to A., will also pass the remainder expectant to B. The whole estate passes at once from the grantor to the grantees, and the remainder man is seized of his remainder at the same time that the particular is seized of his estate tail." In page 304, "if A. be tenant for life with remainder to B's eldest son then unborn in tail, the instant that a son is born the remainder is no longer contingent but vested." In *1 Fearn on Cont., Rem., p. 28*, it is laid down "that wherever the ancestor takes an estate of freehold which Mary Evans did in this case, having a life estate in the land or franktenement, and an immediate remainder is therein limited in the same conveyance to his heirs, or heirs in tail, such remainder is immediately executed in possession in the ancestor so taking the freehold, and therefore is not contingent or in abeyance as an estate for life to A, remainder to the heirs of the body, this is not a contingent remainder to the heirs of the body of A, but an immediate estate tail on A." The footnote to this doctrine in Fearn states "that as no person can have an heir during his life, the heir being the individual on whom the law casts succession at the instant of the ancestor's decease, it might be thought that where an estate is limited to a person expressly for his life and after his decease to his heirs the limitation to the heirs must necessarily be contingent during his ancestor's life; but by a rule of law of antiquity, it is settled that in all these cases, the remainder to the heirs is immediately executed in the ancestor, and therefore not contingent or in abeyance." After fully discussing the question, Fearn concludes in vol. 1, p. 33, thus: "Upon the whole, therefore, the better conclusion.

seems to be that the possibility of the freehold determining in the lifetime of the ancestor who takes it, does not keep the subsequent limitation to his heirs from attaching in himself; and that one may consider it as a general rule that whensoever the ancestor takes an estate of freehold, whether it be or be not such as may determine in his life-time, and there is afterwards in the same conveyance an unconditional limitation to his right heirs or heirs in tail, (either immediately without the intervention of any mesne estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is with the interposition of some such mesne estate), then such subsequent limitation to the heirs or heirs in tail, vests immediately in ancestor and does not remain in contingency or abeyance, with this distinction, that where such subsequent limitation is immediate, as in the present case." Mary Evans and the heirs of her body lawfully begotten, it then becomes executed in the ancestor, forming by its union with his particular freehold, one estate of inheritance in possession; but where such limitation is mediate it is then a remainder vested in the ancestor, who takes the freehold not to be executed in possession till the determination of the preceding mesne estate. As if there be an estate to A for his life or during the life of C or any other sole estate of freehold, remainder to the heirs of the body of A, this is an estate tail executed in possession in A; but if there be an estate to A for his life, or during the life of C, or any other estate of freehold, remainder to B for life, remainder to the heirs of the body of A, this is only a present freehold in A with a vested remainder to him in tail, to take effect in possession after the determination of B's estate." In three new cases, 250 & 2 Cook's Rep., 504, it is laid down that the admittance of tenant for life being the admittance of him in remainder, the latter has not to prove his own entry or possession, but the possession of the tenant for life, to recover in ejectment.

In 2 Crabb's law of real property, p. 961, in stating what is requisite to a good remainder, it concludes thus: "Hence, therefore, the necessity of creating a particular estate, and of delivering immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. The enjoyment of it, indeed, must be deferred till hereafter, but it is to all intents and purposes an estate commencing *in presenti*, though to-

be occupied and enjoyed *in futuro*." (See Boraston's case, 3 Co., 20, 1 Inst., 49 a 2 Comm., 169.)

In ejectment it is necessary that the plaintiff should recover on the strength of own "title," and if he cannot shew a legal title he must of course fail, and he cannot rely on the weakness of his adversary's claim or equity. Now, title is defined to be "*justa causa pro sidendi id quon nostrum est*," per Lord Coke, 1 Ins., 354, "or it is the means whereby the owner of lands hath the just possession of his property," per Sir W. Blakston, 2 Com., 195. In 2 Crabb, p. 1000, it is said that the first thing necessary to constitute a title in a full and complete possession is technically termed "seisin," denoting that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. Seisin is either in deed or in law. *Seisin in deed* is where the person has the actual seisin or possession, which is otherwise called a freehold in deed. *Seisin in law*, or freehold in law, is when, after a descent, the person on whom the lands descend has the right of possession though he has not actually entered," and in p. 1001, "remainders and reversions being future interests, there can be no seisin in deed of them, only a seisin in law until they come into possession."

From these authorities I think it is clear that John Evans derived the land in question by descent; secondly, that his freehold in remainder was a vested estate-tail in Mary Evans, forming by its union with her particular freehold one estate of inheritance in possession; thirdly, that her admittance and possession ensure to him and in point of law are regarded as his admittance and possession. Lastly, as he therefore reduced the land into possession or had "seisin in law," though not "in deed," of it before the passing of the Real Chattels Act, that Act has no application to the case and the lessor of the plaintiff is entitled to judgment.

THE CHIEF JUSTICE:

I concur in the conclusion at which my brother Judge Robinson has arrived, but I must express my dissent altogether from the main grounds upon which he rested his opinion in the early portion of his judgment, and I hold myself responsible for the judgment I am about to give solely upon the grounds I shall now briefly express.

In this case, after great deal of doubt upon the questions involved in the consideration of it, I am of opinion that the estate vested in Mary Evans under the deed of 1796, was an estate tail general, that is an estate descendible through her to the issue of her body. I am also of opinion that as she lived until 1858, the Real Chattels Act, which was passed in 1834, operated upon the freehold estate then vested in her so as to render it subject to the law which governs the distribution of chattels real, of which a party dies possessed, and it would descend to her next of kin instead of the heir of her body. No one will question the truth of that position, if it had been an estate in fee-simple, instead of an estate in fee-tail, that had been granted to Mary Evans, and that the Act would deprive her heir at law of his right to succeed her in the enjoyment of it. What then is the difference between these two estates or interests in real property? Simply this, that an estate in fee-simple will descend to the heir at law, whoever he or she may be, of the person dying seized of it, but an estate of "fee tail general," as the present is, will only descend to the heir of the body of the person who died seized of it; and, if there be no such heir, it will revert to the person who granted or created the estate-tail. Yet the whole estate is so absolutely vested in the tenant in tail, that is in Mary Evans in this case, during her lifetime, that she can by alienation, wholly defeat the rights of her issue to the property, if she have issue, and, if she had not, she could also defeat the reversion of the party who granted or created that estate, because she had the absolute dominion over it. The law on this subject is clearly stated in 2 Black Com., 15th ed., 119: "The tenant in tail is now enabled to aliene his lands and tenements by fine, by recovery, or by certain other means, and hereby to defeat the interests as well of his own issue, as also of the reversioner." While this estate was vested in Mary Evans, and while she had absolute control over it, to dispose of it as she pleased, the Real Chattels Act is passed and it enacts "that all lands, tenements, and other hereditaments in Newfoundland and its dependencies, which by common law are regarded as real estate shall, in all Courts of Justice in this Island, be held to be chattels real, and shall go to the executor or administrator of any person or persons dying seized or possessed thereof, as any other personal estate now passes to the personal representatives, any law, usage, or custom to the contrary, notwithstanding." I am satisfied that the property in question in this case is subject to this enactment, and that the

lessor of the plaintiff, John Evans, has lost the right to it which he would unquestionably have had, but for this law, and the estate at the death of Mary Evans vested in her executor or personal representative.

Mr. Pinsent for plaintiff.

Mr. Walbank for defendant.

BENNETT v. STEPHENSON.

1860, *January*. BRADY, C. J.; LITTLE, J.; ROBINSON, J.

Sheriff—Attachment—Escape—False return—Practice—Rule nisi—New trial.

In an action against a sheriff for negligence in suffering property which had been attached by him, on behalf of the plaintiff, to escape, and for a false return in alleging that the property was rescued, the jury found for the plaintiff. On a rule *nisi* to set aside the verdict, it appeared that the property attached had been left at the premises of the father-in-law of the debtor, from which it had been subsequently rescued, and against the advice of the plaintiff's agent, who had urged its removal to the plaintiff's premises near by.

Held—(Little, J., dissenting)—The rule *nisi* must be discharged. Leaving the boat at the premises of the debtor's father-in-law was palpable negligence, in view of the fact that it was competent for the bailiff to remove her to a place of comparative safety.

THIS was an action on the cause brought against the defendant, sheriff of the southern district, to recover the sum of £100 for negligence in allowing property, attached at the suit of the plaintiff, to be rescued; and, secondly, for a false return. The plaintiff's case was: that a writ of attachment, tested to June, 21st year of Her Majesty's reign, issued out of the Supreme Court, directed to the defendant, in which the present plaintiff was plaintiff, and one Simon Caul, defendant; this writ issued on the 15th July, 1858, for the amount sworn at £60 6s. 8d. The writ was given to defendant's bailiff, John Butler, for execution, with instructions to attach property of Caul, in the Isle of Valen. Butler proceeded by water, with a crew given him by plaintiff, to the Isle of Valen, served the writ on Caul and attached a boat, which, after having taken possession of, he allowed to be rescued by a mob of persons, who forcibly seized the boat and forced the bailiff, Butler, and

those with him to abandon the property. The plaintiff alleged that upon the boat being attached it ought to have been removed to a place of safety, which was suggested by Captain McGeorge, and not acted upon by the bailiff.

The evidence of Captain McGeorge is as follows:—I know the plaintiff and know the defendant, and was in the Isle of Valen about the 23rd of September, 1858. I saw a person there named Butler, a constable, I believe; I went in with him to take charge of a boat belonging to a man named Caul; the boat lay at a stage head in the harbor; I, my mate, two or three more, namely, one belonging to the store and one belonging to the vessel, the *Lancet*, of which I was master, besides the mate, went with the constable. Mr. George Le Messurier told me to go and assist the constable in taking the boat out, and go by his (the constable's) orders; it was on this errand we met; we went on board and took charge; we found on board Caul and another; I asked the constable if we should take the boat away; he said "No, touch nothing until I give orders"; it was about eleven o'clock when I went aboard of her; I stayed aboard with constable and rest of the men until two o'clock; the constable went with two hands to get his dinner, leaving me with two hands on board; we remained on board until they came back from dinner; I then, with my two men, went to dinner; got my dinner and was returning to stage where boat was lying, when I met him (constable) about cable length from the stage, with the two men with him; he told me he was forced to take to the water or leave the boat. I returned with him; I saw the boat again about half-past six; she was then two cables length from the stage head, going out the harbor; there were a good many people on board; could not distinguish who they were. The boat never came back to Isle of Valen to my knowledge; on leaving the stage, as before mentioned, I came with Butler to Bennett's wharf, and there we separated.

Cross-examined by Attorney General—I don't know where Caul lives; when I went on board the boat Caul was there with another man; they said nothing to me; sheriff's bailiff went aft and consulted with them; did not hear what they said; Caul and other man remained there all the time. I don't know whose stage it was; I have been acquainted with Isle of Valen for three or four years; I have been trading there twelve months steadily. There was a gathering of people on the stage before I left to go to my dinner; there was 250 or 300 people, perhaps more; as many there as would carry the boat altogether; there

were a good many threats in the way of abusive language; I got most of the abusive language; I was not sworn as a bailiff, nor were the men that went with me that I am aware of; Mr. Le Messurier was not there whilst we were in possession of the boat; there were several men visited the boat whilst I was on board; there were no boats, to my recollection, surrounding her; I do not know what was in her; her sails were bent whilst I was on board; no one attempted to rescue the boat from our possession; when I met Butler returning I did not go to see the boat; I returned with him; I had no conversation with Mr. Le Messurier on that subject after I left the boat with Butler; Le Messurier's room is 130 yards or more from the stage where the boat was; there were four or five men employed about Mr. Le Messurier's wharf; both Butler and two others got our tea at Mrs. Le Messurier's house; I did not see the boat after my conversation with Butler until she was going out the harbor; I counted six or seven men in her; there were one or two boats about her; I am employed by Mr. Bennett now; I believe he is owner of the vessel I am master of. — was the name of the mate who went on board of the boat; I did not go on board the boat after Butler left her, as I considered if the constable could not take charge, I had no business, I had no authority, without him; he told me before not to do anything without his orders; there was nothing to prevent us from taking the boat when we first went on board, except Caul and his man; we were strong enough to take her away if the bailiff gave orders—if no more resistance came against us; I asked the bailiff when we were going in if we would take boat right away; he said, "Touch nothing without my orders"; up to the time of my going to dinner he made no attempt to recover her; the weather was fine; there was no resistance whilst I was on board; for half an hour or an hour after we were on board no one came down to the stage head; she was fastened to the stage head; all we had to do was to cast off her fasts or cut them; I was there by Mr. Le Messurier's orders to assist the bailiff.

JAMES MCGEORGE.

Sworn before me at St. John's, this 23rd day
of November, 1859.

D. W. PROWSE.

The return of the sheriff was as follows :

NEWFOUNDLAND—IN THE SUPREME COURT.

Cause { *Charles Fox Bennett, plaintiff,*
 vs.
 Simon Caul, defendant.

By virtue of Her Majesty's writ to me directed, and to this schedule annexed, I duly made my warrant and directed the same to "John Butler," my bailiff, commanding him to attach Simon Caul, the above-named defendant, late of Placentia Bay, fisherman, by his lands and chattles, goods, debts and effects, to the value of seventy-five pounds six shillings and eight pence, sterling, and commanding that he, the said defendant, should be before the Justices of the Supreme Court, on the day and place in the said writ mentioned, and before the return thereof, to answer Charles Fox Bennett in the plea, and to the bill therein mentioned, which said bailiff, by virtue of my aforesaid warrant, afterwards, on the twenty-third day of September last past, and in the twenty-first year of the reign of our Lady the Queen, at "Isle Valen," in Placentia Bay, and in my district, attached and seized a certain fishing boat and materials, according to my said warrant, and had the same in his possession until the said Simon Caul, with Michael Dunn, John Bennett, John Rogers, James Gaulton, Robert Rogers, Patrick Leonard, Martin Gaulton, Edward Marooney, Edward Leonard, Joseph Gaulton, John Stowbridge, Thos. Stowbridge, Richard Pitman, Charles Pitman, Patrick Gaulton, James Tulford and William Power, with divers others persons to me and my said bailiff at present unknown, with force and arms, made an assault on John Butler, my bailiff, and then and there beat and took hold of him, and threatened his life if he would not quit the possession of the said fishing boat so attached as aforesaid, and there, the said fishing boat being so attached and in custody as aforesaid, they, the said Simon Caul, Michael Dunn, John Bennett, John Rogers, James Gaulton, Robert Rogers, Patrick Leonard, Martin Gaulton, Edward Marooney, Edward Leonard, Joseph Gaulton, James Tulford, John Stowbridge, Thomas Stowbridge, Richard Pitman, Charles Pitman, Patrick Gaulton and William Power, then and there, out of my custody and the custody of my said bailiff, against my said will and the will of my said bailiff, did forcibly take and rescue against the peace of our Lady the Queen; and, the said Simon Caul, with force and

arms against my will and the will of my said bailiff, unlawfully then and there rescued and forcibly took away the said fishing boat, and the said Simon Caul, having no other property, therefore I cannot attach the said goods and chattles of the said Simon Caul, as by the said writ I am commanded.

JOHN STEPHENSON.

A few other witnesses were called for the plaintiff, and letters put in evidence from Mr. Hoyles to defendant, and defendant's answers denying any negligence on the part of his bailiff.

The Attorney General contends that no negligence could be imputed to the defendant or his bailiff: all due care and precaution had been taken by the officer, and those with him—some four or five in number—could not resist the attack of some thirty or forty rescuers: the rescue was a forcible one, beyond the control or prevention of the bailiff, and the return made by the sheriff coincided with the facts. He (Attorney General) regretted that Butler, who had been notified to attend, was not present, but, residing far to the westward, as he presumed, some accident or stress of weather prevented his attendance.

His Lordship Mr. Justice Robinson charged the jury: The plaintiff sues the defendant, a sheriff of the southern district, for having negligently suffered a boat, which he had attached at the suit of the plaintiff, to escape, and for having made a false return to the writ of attachment in stating that the property was rescued by violence by a number of persons named. The case was one of grave importance to the public, inasmuch as it was of the first consequence to all that the Queen's writ should be respected throughout the land; and that creditors should be at all times enabled to put the law in force against their debtors where the debtor has property to meet his debt, for it is obvious that no merchant would be reckless enough to issue supplies if the law, which should be his security, is disregarded. It is true that the office of sheriff is a responsible one, and it is made tenfold more onerous when the law is not respected and violations of it vindicated; but his responsibilities and risk are presumed to be taken into consideration in the appointment of the remuneration he receives for his services, and should not affect the rights of the plaintiff. The jury ought not to strain cases against a sheriff, nor should they, on the other hand, unduly favor him, because he undertakes his office with all its responsibilities, and must be answerable for

all shortcomings on his own part or the part of the bailiff whom he employs. There is one circumstance that has appeared in the case which calls for the notice of the Court—the parties who are charged with having violated the law, by rescuing in open day out of the hands of the sheriff, property which he had attached under a writ from the Supreme Court, are known, their names are filed of record in this Court, and yet no depositions have been made before a magistrate, nor any action taken by the Crown officers to bring the offenders to justice, and though upwards of a year has elapsed since this transaction occurred. In the present case the plaintiff alleges that the defendant's bailiff acted negligently with the property attached; that he was urged by the plaintiff's servant, Captain McGeorge, to remove the boat from Dobbin's wharf to a place of safety, with which suggestion the bailiff would not comply, and that, in consequence, a few hours afterwards, the friends of the debtor rescued the boat and carried her away. It is for the jury to say whether the bailiff did or did not act negligently, and whether the boat was lost to the plaintiff in consequence of such negligence—that is the first question raised. The second question is, whether the sheriff's return on the writ—that the boat was forcibly rescued from him without his assent or negligence—be true or false. If the jury should find that the property was lost by the negligence of the bailiff, or that the sheriff's return is false, they will give their verdict for the plaintiff for such damages as they believe he sustained thereby. If, on the other hand, they do not find such negligence in the bailiff, and that the return be true, they will give their verdict for the defendant. Upon the question of the return, two notes have been put in evidence from the plaintiff's attorney to the defendant; one claimed to be in favor of the plaintiff, the other in favor of the defendant. In the one, the plaintiff requires the defendant, if there was a rescue, to lay depositions of the fact before some magistrate, that it may be enquired into and the offender punished, otherwise the defendant would be held responsible; in the other, the plaintiff admits that he had been informed that the property had been rescued. The weight to be attached to these notes, as well as to all other parts of the evidence, is wholly for the jury.

Verdict for the plaintiff, £69 6s. 9d. sterling.

On a subsequent day a rule nisi was obtained to set aside the verdict, when the following judgments were delivered discharging the rule, (Little, J., differing):

HON. MR. JUSTICE ROBINSON :

This was an action against the defendant as Sheriff of the Southern District for negligence in suffering the property of one Simon Caul which had been attached by him at the suit of the plaintiff, and which it appeared was the only property Caul possessed to respond to the action, to escape, and for a false return to the said writ of attachment in alleging that the property was rescued.

On the trial no witnesses were called for the defendant and the questions left to the jury were, 1st, was the property attached lost to the plaintiff in consequence of the voluntary or negligent conduct of the defendant or his bailiff; 2nd, was the property really rescued from the custody of the Sheriff without the connivance or negligence of his bailiff; for the matter stated in the return of the Sheriff, if true and not occasioned by his own wrong, was a valid excuse, and the onus of disproving its truth lay upon the plaintiff.

The jury found a verdict for the plaintiff for the sum of £69 6s. 8d. stg.

No motion was made at the trial for a non-suit, nor was any exception then taken to the charge of the judge.

The Attorney General subsequently obtained a rule nisi to set aside the verdict and enter a non-suit, or to have a new trial on the grounds :

First.—That the verdict was contrary to evidence, the return of the Sheriff being *prima facie* evidence of the facts, and no evidence given to falsify it; and that the question of 'escape' could only be raised in cases of arrest.

Secondly.—That there was a misdirection in telling the jury that the Sheriff's omission to cause depositions to be made before a magistrate of the rescue when so required, was an element in their consideration of the truth of his return.

As regards the first point, it appeared in evidence that Simon Caul lived in Isle Valeu, in Placentia Bay, where the plaintiff also had a mercantile establishment; that in September, 1858, Caul being indebted to the plaintiff in a sum exceeding £100, the plaintiff issued a writ of attachment against him, directed to the Sheriff of the Southern District, under which a boat belonging to Caul was seized, and which was then lying at the

stage of his father-in-law, Dobbin; that the plaintiff's agent sent a master of a vessel named McGeorge and four men to assist the bailiff in executing the writ; that Captain McGeorge suggested to the bailiff to remove the boat from Dobbin's wharf to the plaintiff's premises when he was forbidden to do so; that there was nothing at that time to prevent the removal of the boat, that the sails were left on the boat, and that after she had been under attachment at Dobbin's wharf from four to five hours, a crowd collected, took the boat from the Sheriff's officer, when Caul carried her off, and she has not since been seen. That the names of the rescuers to the number of about twelve were known to the Sheriff, and are mentioned by him on his return.

The defendant did not produce his bailiff or any witness whatever at the trial, and I suppose the jury inferred from that fact that the bailiff could not assist the defendant. I left it to the jury to say whether they were satisfied from the evidence that the loss of the boat to the plaintiff was occasioned by the default or negligence of the bailiff (for which the Sheriff was responsible) and they in effect found that it was, and I quite agree with them in that opinion. It seems to us palpable negligence, if nothing worse, to leave a boat with her sails bent all ready for escape, at the stage head of the defendant's own father-in-law, in an outharbor where there was neither gaol, court house or constable, and where the mercantile premises of the plaintiffs were close at hand, and to which the bailiff was invited to remove the property but refused. Such conduct of the bailiff amounted to a temptation to the owner of the boat to carry her off. I think the property would have been safer at the creditor's wharf who had an interest in keeping it safe than at the wharf of the debtor's father-in-law, who had an interest in taking it away, and even if it were not, the bailiff would have relieved himself of much responsibility by complying with the suggestion of the creditor's own servant, Captain McGeorge. I think, therefore, the verdict of the jury was not contrary to, but was consistent with the evidence. Upon the second ground, I left to the consideration of the jury two notes from Mr. Hoyles, the plaintiff's attorney, which had been put in evidence, in one of which he stated that he had been informed that the boat was rescued, and which I told the jury was, in my opinion, favorable to the defendant as supporting the truth of his return; in the other of which he required the defendant, if there really was a rescue, to take the

necessary steps to have the rescuers punished, otherwise the plaintiff would hold him responsible as for a false return, and I told the jury that in my opinion the neglect of the Sheriff to take such steps when so required was a proper ingredient to be considered by them when determining upon the truth or falsehood of the return; but I also told them that they alone were the judges of the weight to be attached to either note. I thought at the trial and I think still that the quiet acquiescence in a public breach of the law, and an open violence and contempt offered to the Queen's writ, was a remarkable feature in the case, and was not at all calculated to promote the administration of justice or the security of the Sheriff on future occasions. I am quite sensible of the responsibilities that attach to that officer, and I believe that in the outposts he often finds difficulty in procuring a proper bailiff, but the Court has not the power of relieving him of such responsibility. I do not feel that any imputation can fairly rest upon Mr. Stevenson personally in this matter, he is legally answerable for the acts of his bailiff, and upon the best consideration I can give the case I am not able to entertain a doubt of the justice of the verdict, or of the correctness of the charge.

In the case *Arden v. Goodacre*, 5, *E. L. R.*, 438, which was an action tried in 1851 in England before the Common Pleas, against a Sheriff for an escape on mesne process, it is said *arguendo* and not contradicted, "that the Sheriff may indict the debtor for an escape, and may obtain a bench warrant, or he may, if the creditor recovers against him for an escape, sue the debtor for the damages, and it is not suggested on any authority that it is the duty of the creditor to do anything beyond delivering the writ of attachment."

I think the rule *nisi* must be discharged.

HON. MR. JUSTICE LITTLE:

This was an action to recover damages from the defendant as Sheriff of the Southern District of this Island, for voluntarily permitting a boat attached by his bailiff, at the suit of the plaintiff, against one Caul, to be rescued from his custody. The facts of the case, as they appeared in evidence, are, that a writ of attachment was issued by the plaintiff against Caul for £69 6s. 8d. stg. in July, 1858; that the writ was placed in defendant's hands to be executed; that he sent his special warrant to a person named Butler, of Burin, to execute the attachment

as his bailiff; that the bailiff went to Isle of Valen when the writ was to be executed, and called on the plaintiff's agent there (Mr. George Le Messurier) to point out the property to be attached, and give assistance to effect the attachment; that LeMessurier told him the only property of Caul's that he could attach was a large boat there, lying at the stage-head of Caul's father-in-law, and he sent four or five men with him to attach it; that the bailiff went into custody of the boat about eleven o'clock in the morning, having with him the persons sent by plaintiff's agent to assist him; that he remained in charge until about four o'clock in the afternoon of the same day; that Caul and his son remained in the boat from the time it was attached, and that a mob was gathering evidently from the time the attachment was laid, for the purpose of rescuing it from the bailiff, until they amounted to about 250 or 300 persons; that shortly after the attachment was laid, one of the men (McGeorge) sent by plaintiff's agent to assist the bailiff, told him that he had better remove the boat, and that witness was of opinion the boat might have been removed before the crowd gathered, but it does not appear in evidence where it was intended to remove it to, or that it would have been safer at plaintiff's wharf, a distance of 130 yards, than where it then was. The bailiff declined attempting to remove the boat then, the crowd was still gathering and threatening the bailiff's men; and at four o'clock the bailiff and his assistants were driven by main force from the boat, which he was told he should leave or take to the water. The boat was thus forcibly rescued by the mob against the will and power of the bailiff, and taken away to sea beyond the reach of the defendant; and it has not, it appears, since come within his power, that neither the bailiff nor the plaintiff's agent, who is a magistrate, could at that time command sufficient force to retain or retake the boat from the superior numbers against them. The defendant, as Sheriff, made a special return on the attachment of these facts and of all the circumstances, stating that a rescue had been forcibly effected of the boat by several persons named and others unknown. The day after the rescue Mr. LeMessurier wrote to the plaintiff, informing him of the facts, and stating that the bailiff and his assistants "were opposed by a number of persons and ultimately put out of the boat by force, and she was carried off by the mob." He states also that he "did not think the bailiff acted with sufficient promptness before the crowd collected." From what McGeorge says, he thought the bailiff might have

brought the boat out of Caul's hands. He says "they threatened to put him overboard if he did not leave quietly, and as he has a list of those persons who prevented him from discharging his duty, and is about making an affidavit before Mr. Hooper to forward on to the Sheriff, that officer will be able to judge what steps to take in the matter." On the 2nd October following Mr. Hoyles, as plaintiff's attorney, wrote to the defendant the following note:

"I beg to acquaint you that by communications recently received from Placentia, I have learned that the writ of attachment in Bennett v. Caul having been placed by you in the hands of your deputy there, that officer, after having made the levy and possessed himself of the property, in pursuance of the writ, was forcibly dispossessed of it by the defendant and others acting on his behalf. I lose no time in communicating to you this information, that you may take such steps as may be necessary for your indemnification in this behalf without delay, and for that purpose enclose a copy of the letter I have received."

Upon this evidence the jury found a verdict for the plaintiff for £69 6s. 8d. stg., being the amount of the attachment against Caul.

A new trial had been moved for and a rule nisi obtained on the grounds, 1st, that the verdict is contrary to the weight of evidence; 2nd, that the judge's charge was incorrect in not directing the jury that the Sheriff's return was *prima facie* evidence of the facts in relation to the rescue stated therein, and in telling them to consider the defendant's neglect to prosecute the rescuers as evidence against the truth of his return. As it appears that exception was not taken to the charge in due time, and that objection has been urged by the plaintiff's counsel, I am bound, in point of law, to confine my observations to the first ground, viz, that the verdict was contrary to the weight of evidence. Now the first evidence put in by the plaintiff was the attachment with the Sheriff's special return endorsed upon it, detailing the circumstances of the forcible rescue of the boat by a mob. According to the view I took of this case on the trial, and I still entertain the same opinion, I think the plaintiff was bound to show by clear and satisfactory evidence that the Sheriff's return was false in fact. "Under the 36th rule of the Supreme Court, the Sheriff is allowed 5s. per day to be paid to any officer he may employ to keep possession of goods attached, until either party should relieve him

from that responsibility by giving him security that the same shall be forthcoming at the return of the writ; provided always that should he be enabled to remove the goods so seized to a place of safety, he shall be entitled to charge the expense necessarily incurred by such removal."

According to this rule the Sheriff is authorised to keep his officer in charge of property attached until he shall be enabled to remove it "to a place of safety," or either party gives bail. The question then arises, was the officer bound to remove the boat at once from where it was moored; and was there a place of safety at hand to which it could have been removed, that is to say, a place where it would not be as liable to be rescued from the bailiff and his four or five men by the mob who rescued it from the stage-head. LeMessurier admitted that the bailiff had all the effective force he could get there. I think a certain discretion must be left to the Sheriff's officer as to the propriety of removing property attached immediately. The liability of the Sheriff continues after the removal, and until the property be bailed.

Looking at the difficulties surrounding a Sheriff in the execution of process in a distant isolated outharbor, I should hesitate to hold him guilty of negligence without positive evidence that there was such a place of safety available, and that the property could have been safely removed. It is right to state, though not of much weight, that the wind was blowing very strong out of the harbor all that day.

I quite agree with my brother judges that it was not satisfactory that the bailiff was not produced on the trial. But I regard the Sheriff's return put in by the plaintiff, as part of the case, as *prima facie* evidence of the facts stated in it, and it was clearly the duty of the plaintiff to prove that the return was false. The agent's letter to the plaintiff the day after the occurrence, and Mr. Hoyles' letter to defendant support the return, while we have on the other side the opinion of McGeorge that they might have removed the property before it was rescued. But, I repeat there was no satisfactory evidence that there was a place of safety to which it could have been removed; it is merely inferred that it would have been safe at plaintiff's premises, and the bailiff did not deem it expedient, I presume, to attempt the removal under the circumstances.

In cases of attachment of property, Story in his able treatise on bailments, p. 629, states, that the officers in charge are undoubtedly responsible "for good faith and reasonable diligence."

If property is lost by any neglect or dishonest execution of the trust they are liable in damages. But they are not liable as of course, because there has been a loss by embezzlement or theft. In order to charge them in such cases the loss must have arisen from the culpable neglect or fraud either of themselves or their servants. They are bound to exert such ordinary diligence as belongs to a prudent and honest discharge of their duties. But in p. 135, he says also whether they would be responsible for "ordinary negligence" does not appear to have been decided in any adjudged cases. There is no imputation of fraud or collusion against the bailiff. Then the question arises on the general law applicable to the subject, did he use reasonable or ordinary diligence, in other words, did the loss arise from his culpable neglect? I cannot say that it did.

Now, as to the effect of the Sheriff's return, it is laid down in Watson, p. 96, that "to a writ of *mesne process*, a return that the defendant was rescued out of the custody of the Sheriff, or that the defendant overpowered the officers, is good." The writ of attachment being a *mesne process*, the same rule applies to it. In p. 94 credence is given to the return of the Sheriff, so much so that there can be no averment against the Sheriff's return in the same action, although a party in any other action or in an action against the Sheriff may show that such return is false. Even in another action the Sheriff's return is *prima facie* evidence of the facts contained in it, and in an action for maliciously suing out a *fi. fa.* after a sufficient levy, having returned that he had forborne to sell under the first writ, had sold under the second writ at the instance and with the consent of the then plaintiff, it was held that these returns were *prima facie* evidence of such consent—*11 East, 296, 2 Bing., N. C., 176*. In p. 98, it is said, the return of a rescue is in the nature of a conviction and the courts will grant an attachment thereon in the first instance, the return of a rescue not being traversable. For a rescue on *mesne process* the plaintiff may bring an action against the rescuers, &c.

I consider that on the return of the writ the duty of the Sheriff in respect of that process or suit ceased, and that although he might, he was not bound to proceed against the rescuers, as the return, if true, was a good one in point of law and a justification for him under the circumstances stated in it. On the return being filed, it was competent for the plaintiff to move for an attachment against the rescuers and to have them brought before this Court and punished as they doubtless meri-

ted, or they might have been indicted at the suit of the Crown. But I do not conceive that the Sheriff is chargeable in this action for neglect of duty in not prosecuting the offenders. His not doing so is, in my judgment, no evidence against the truth of his return. I think he did all he could be strictly called upon to do by making the return and placing the case in the hands of the Attorney General. It then becomes the duty of the Crown to vindicate the supremacy of the law and teach those who resist its officers in the proper discharge of their duty, that they shall not do so with impunity in any part of this colony.

For these reasons I think there was not sufficient evidence to sustain the finding of the jury; while I regret that I am obliged from the view I take of the case, to differ from the judgment of my learned brother judges.

HON. SIR F. BRADY, C. J.:

The Chief Justice concurred in the judgment delivered by Judge Robinson in this case. The Sheriff gave to Butler, his bailiff, the writ under which Butler seized the boats, &c. He was then bound to use all reasonable care, prudence, and diligence to prevent any rescue of the property, and from the evidence of Captain McGeorge on the trial, his lordship was not satisfied that such prudence or care was exercised.

The boat was kept in a place where, from all that appeared, the event was likely to occur that did happen. If the suggestion of Captain McGeorge had been complied with, to have the boat removed to the plaintiff's premises, and if rescued afterwards the Sheriff would not be liable. Captain McGeorge gave powerful evidence of the want of diligence in the case. The Chief Justice's mind was more affected by the fact that Butler was not produced on the trial. Why was he not called to shew the care and diligence used? The inference is, he would be there if he could serve the defendant and that he would not be brought to damage the case. It does not appear that the verdict is against the weight of evidence. Rule ought to be discharged.

Mr. Hoyles, Q. C., for plaintiff.

Attorney General and Mr. Flood for defendant

1860, January. HON. MR. JUSTICE ROBINSON.

Contract—Vendor and purchaser—Sale by sample—Entire contract—Acceptance by servant.

Where the defendant purchased a quantity of casks by sample, and the plaintiff, under the contract, delivered the casks to the defendant's store-keeper, who accepted the same, but was not aware of the nature of the contract.

Held—The receipt of the casks by the store-keeper was no acceptance. Even a knowledge by the defendant of his store-keeper having received the casks without an opportunity on his part to examine them would not amount to an acceptance.

THIS was an action of assumpsit brought to recover the price of sixty-six fish casks; it comes before the Court summarily, and consequently we have to determine the facts as well as the law.

The amount at issue is small, but the principle of law involved is important and of general application.

We think the evidence establishes that the plaintiff sold and the defendant purchased a number of casks as an entire contract, upon the condition that they were to be of corresponding quality with three exhibited as samples, and that only ten of the lot corresponded with such samples; that the casks were delivered by the plaintiff to the defendant's store-keeper, who had no knowledge of the agreement, and on the following morning, when the defendant first saw and examined them, he immediately rejected them as not according to sample, and gave notice to the plaintiff that he would not accept them, and requested him to remove them from his premises.

On these facts, we are of opinion that the contract being entire and not being fulfilled, the defendant was justified in rescinding it in toto as he did, unless he accepted the casks, which we think he did not: he swears that he was not aware of his storekeeper having received them the evening before, and if he were, the receipt, without having an opportunity of examining them, would not necessarily be an acceptance.—*P. Alderson B, Marlman v. Bellhouse, 9 M. & W., 600.*

No authority has been cited to show that in any entire contract where part of the goods corresponds with the sample or condition the defendant is bound to pay such part, the case of the *Campeacywood* was founded upon the express terms and does not apply to the present case. We therefore think there is no contract express or implied on which the plaintiff can recover and that judgment should be entered for the defendant.

1860, *January*. HON. SIR F. BRADY, C. J.

Practice—Pleadings—Defence—Set off—Mutual debts—Demurrer.

In an action brought by the plaintiffs against the defendant as indorsee of a promissory note drawn by Bulley, Mitchell & Co., and indorsed to the bank, the defence set up was that the makers of the note had by deed assigned sufficient property to the bank to pay their indebtedness to the bank, and afterwards in trust to pay their other creditors; that the said note sued on was covered by the said trust, and the defendant claimed to set off the said amount due them under the said trust against the amount sued for. This plea was demurred to and the cause of special demurrer assigned was that the said debts were not mutual.

- *Held*—The defendant had no claim at law or in equity against the bank; to constitute such a set off as claimed he must have paid his endorsement, which he had not. The promise alleged in the plea was a mere *nudum pactum*, upon which no action could be maintained, and, consequently, did not establish any right to the set off pleaded.

THIS was an action of assumpsit brought by the bank as indorsee of a promissory note drawn by Bulley, Mitchell & Co., and endorsed to the bank by the defendant. The declaration contained a special count on the note and the common counts. The defendant pleaded the general issue, and also the following special plea:

“And for a further plea in this behalf the defendant saith that the plaintiffs ought not to have or maintain their said action against him, because he says that, to wit, on the twenty-third day of December, one thousand eight hundred and fifty-seven, at St. John's, aforesaid, one John Bulley, of St. John's, merchant, by deed of that date under his hand and seal, assigned and conveyed to the said plaintiffs five several parcels of land, situate and being in the district of St. John's, the property of the said John Bulley, and being of great value, to wit, of the said value of ten thousand pounds, upon trust after payment by the said plaintiffs out of the proceeds of the said lands of a certain sum of fifteen hundred and forty-five pounds currency, in the said deed mentioned, as due and owing by the said John Bulley and others to the said plaintiffs, with interest thereon, to pay, apply and appropriate the said lands, and the rents and profits thereof, to the due payment of all such other sums and direct and indirect liabilities of the said firm of Bulley and Mitchell, in the said declaration mentioned, as they, the said firm, had then incurred or might incur, or which might become due to the plaintiffs, within six calendar months

from the date of the said deed, which said deed was subject to a condition that if the said firm of Bulley, Mitchell & Co., should, within six calendar months from the date thereof, pay off to the said plaintiffs the said sums of fifteen hundred and forty-five pounds currency, in St. John's, aforesaid, and all other sum or sums of money, or other liabilities, that might become due from the said Bulley, Mitchell & Co., or for which they or any of them were or should be liable either directly or indirectly to the plaintiffs, in the meantime, as the same should become due or payable, together with interest at the rate of six per cent per annum, then the said deed should become void, and the defendant, unless that the said John Bulley wholly failed and made default in the performance of the condition for redemption contained in the said deed, that the said plaintiffs then and there accepted the said deed and undertook the performance of the conditions and trusts thereof, and entered upon and took possession of the said lands and received the rents and profits thereof, and applied the same and the said lands to the purposes of the said trusts; that the said promissory notes and the said sums of money in the said declaration mentioned, and for recovery of which this action is brought, were and are direct liabilities of the said firm of Bulley, Mitchell & Co. to the said plaintiffs within the terms, trusts and conditions of the said deed, and were due and payable to the plaintiffs within the six months in the said deed mentioned; that the amount received and realized by the plaintiffs from the said lands under the said deed, and in pursuance of the trusts thereof, before the commencement of this suit, greatly exceeded the said sum of fifteen hundred and forty-five pounds and interest thereon, and all other liabilities of the said firm of Bulley, Mitchell & Co. arising to the said plaintiffs within the said six months, including the said notes and the said several sums of money in the said declaration mentioned, and that the plaintiffs thereby, then and there, had and received to and for the use of the defendant a large sum of money, to wit, the sum of two hundred pounds and upwards, which they, the plaintiffs, then and there, promised to defendant to pay and apply to his use; and the defendant further saith that, of the sum of two hundred pounds, or so much thereof as may be necessary in that behalf, he, the defendant, is ready and willing, and hereby offers to set off and allow against and in discharge and payment of the said notes, and the said several sums in the said declaration mentioned, and sought to be recovered in this suit,

pursuant to the statute in such case provided; and this the defendant is ready to verify, and wherefore the defendant prays judgment if the plaintiffs ought to have or maintain their said action thereof against him, &c."

For this plea there was a demurrer, and the following causes of special demurrer were assigned: "That the said plea attempts to set off an alleged debt which cannot by law be set off against it; that the said debts are not mutual, &c." At the argument of this case it was not contended by Mr. Hoyles, counsel for defendant, that any equitable claim which the defendant might have under the mortgage of the bank could be the subject matter of set off, but he argued that the defendant, having, as he alleged, such an equitable claim, the promise by the bank to pay and apply to the defendant's use a portion of the funds realized under the mortgage, converted the demand of the defendant's into a legal debt against the bank, which he would be entitled to set off. There would be a great deal in this argument if it could have been shewn that the defendant had such an equitable claim against the bank, but it was manifest that he had no claim whatever, at law or in equity, against the bank, not having paid his endorsement, and, therefore, the promise alleged in the plea is a mere *nudum pactum*, as Mr. Little contended, upon which no action could be maintained, and, consequently, it did not establish any right to the set off pleaded. The demurrer must, therefore, be allowed.

Mr. Little and Mr. Pinsent for plaintiffs.

Mr. Hoyles, Q. C., for defendant.

1860, *January*. HON. SIR F. BRADY, C. J.

Bill of exchange—Promissory note—Insolvency of maker—Presentment of note for payment to maker—Notice of dishonor—Waiver—Pleading, what is necessary.

To an action against the indorsee of a promissory note, where the maker had become insolvent, it appeared that no application had been made to the makers of the note when it matured as they were notoriously insolvent, but a notice had been sent to the indorsees, the receipt of which had not been proven. It did appear that one of the indorsees, the defendant, had repeatedly asked the indorser for delay, and asked not to be pressed for payment, but did not expressly promise to pay. Subject to objection, the jury was directed to find for the plaintiff. Subsequently a rule was granted to set this verdict aside, on the following grounds: (1) want of presentment to makers; (2) want of evidence of their default; (3) want of notice of dishonor to indorsee.

Held—(Setting aside the verdict)—The known bankruptcy or insolvency of the maker of a note, or his being in prison, constitutes no reason in law or equity or in bankruptcy for the neglect to give due notice for non-payment.

Held—Where an indorsee of a note is aware of the insolvency of the maker and knows that the note has not been presented to the maker for payment, and that he has not himself had any legal notice of the dishonor of the note, and that he had been discharged from the obligation of paying it by the laches of the holder, nevertheless gives a distinct promise to pay, he thereby waives the objections; but in such a case the declaration, instead of averring a presentment where such was never made, must state the facts relied on as constituting a waiver of the omission to make such presentment.

THIS was an action brought by the plaintiffs as the indorsers of a promissory note against the defendant as indorsee of the note. The case was tried before me last term, and a verdict was obtained by the plaintiff for the sum of £133 10s., subject to several objections raised by Mr. Hoyles on behalf of the defendant. I rest my judgment in this case both upon the pleadings and upon the evidence produced at the trial. There were two counts upon the note in the declaration, and in each it was alleged, "and the said Bulley, Mitchell & Co., or any other person did not pay the amount thereof, although the same was then presented to them on the day when it became due, of all which the defendant had due notice." The declaration also contained the common counts. The Hon. E. Morris was called for the plaintiffs, and proved that he was cashier of the bank and he had discounted the note in question, which he produced and proved, and which was in this form:—"St. John's, Newfoundland, Dec. 1, 1857.—Three months after date, for value received, We promise to pay Mr. Wm. Pitts or order, at the Union Bank

in St. John's, Newfoundland, the sum of one hundred and eighteen pounds ten shillings. (Signed), Bulley, Mitchell & Co.," and endorsed by Messrs. Pitts and MacPherson to the plaintiffs for the benefit of the makers. He also stated that in 1858, Bulley, Mitchell & Co. suspended payment, and that when the note fell due he made no application to them for payment as they were notoriously insolvent. He stated that he gave to a messenger of the bank two documents to be delivered to Messrs. Pitts and MacPherson (the defendant) of which the following is a copy:—"Newfoundland, 4th March, 1858—Mr. P. MacPherson,—Sir, I have to give you notice that Bulley, Mitchell and Co's note in favor of Wm. Pitts and endorsed by the said Wm. Pitts and afterwards by yourself for one hundred and eighteen pounds and ten shillings, dated 1st December last, at three months date, fell due this day, and in consequence of the suspension of Bulley, Mitchell & Co. you are held bound, as endorser, for the payment of the same by the Newfoundland Savings' Bank. I am, sir, your obt. servant, (signed), Edward Morris, Cashier Newfoundland Savings' Bank"; but he could not prove that they had been delivered to these parties or to either of them, and the messenger was not called to prove that fact. He further proved that after the note fell due, both Pitts and Macpherson called upon him soon after he gave the notices to the messenger, and that the latter spoke of the hardship of the case that he should be called upon to pay it. "Macpherson did not promise to pay the note, but he wished to have the matter delayed to enable Pitts to have it arranged." The bank delayed accordingly, and, he added, we told the defendant several times that we would proceed at law against him; and on one or two occasions he came to our office in great distress, requesting us to put off the proceedings as Pitts promised to relieve him from his responsibility. The defendant frequently requested that we would not press him. This was the whole of the evidence produced and subject to Mr. Hoyles' objections, upon which he called for a non-suit. I directed the jury to find a verdict for the plaintiff for £133; 10s., for principal and interest due on the note. Subsequently Mr. Hoyles obtained a rule to set this verdict aside, and to have a non-suit entered upon the following grounds:—"The want of presentment of the note to the makers; the want of evidence of their default; and the want of notice of the dishonor of the note to the defendant"; to which rule cause was afterwards shown by Messrs. Little and Pinsent for the plaintiff. It is plain from

the evidence of Mr. Morris that none of the material averments in the declaration: first, the presentment of the note for payment; second, the default of the makers; and third, the notice of the dishonor of the note—were proved in this case; but, on the contrary, the evidence was expressly that no presentment was made to the makers for payment of the note, or at the Union Bank, where it was made payable, and, therefore, there was no proof of default made by them, and consequently there could not be, with truth, a legal notice of the dishonor of the bill proved, because it should state a presentment and dishonor, as it does not contain these statements. From the nature of the contract between endorsee and endorser there must be a presentment for payment and a due notice of dishonor given, and these must be averred in the declaration or it will be bad on general demurrer; and, at the trial, these averments must be sustained by evidence, unless there be circumstances, which in point of law dispense with presentment and notice of dishonor, and, in that case, such circumstances should be specially averred in the declaration instead of the averments, as in the present case, of an actual presentment for payment and of dishonor where it was clearly proved that a presentment was never made." The effect of indorsing a bill or note is a conditional contract on the part of the indorser to pay the immediate or any succeeding indorsee or bearer, in case of the acceptor's or maker's default.—*1 Steph., N. P., 766.* It is, therefore, generally essential to aver and prove in an action against an indorser that the condition has arisen upon which his liability depended, while in this case the very contrary has been proved, for the makers were never asked to pay, and consequently, no legal notice of default by them or dishonor of the note could be given or proved. The plaintiff's counsel, conscious of the validity of these objections, next resorted to the only ground upon which they could with a semblance of right rely, and that was, that while they admitted the necessity of presentment and notice of dishonor as ordinarily essential to the right to recover in an action of this kind, yet, that in this particular case the performance of these conditions were dispensed with or waived. The grounds relied upon for that purpose were those which arose from the evidence of Mr. Morris, which I have given above, as shewing that the makers were notoriously insolvent, and that the defendant, after the dishonor of the note, acknowledged his liability to the bank.

As to the insolvency or bankruptcy of the acceptor or maker dispensing with presentment for payment of a bill or note, the law is so plain as not to admit of a doubt upon the subject, the obligation to make due presentment remaining just the same as if there were neither insolvency or bankruptcy. In *Chitty on Bills, 7th ed., 246*, the law is there laid down: "It has been holden that even the bankruptcy, insolvency or death of the acceptor of a bill or maker of a note, however notorious, will not excuse the neglect to make due presentment. If the maker of a note has shut up his house, it will not suffice merely to present it there, for the holder ought to inquire after him and endeavour to find him out. At all events, although the drawee of a bill or maker of a note, being bankers, may have shut up and abandoned their shop, yet a presentment there, or to them in person, must be made, and it will not suffice to allege in a declaration that they became insolvents and ceased and wholly declined and refused to pay at their bank any notes then payable." Again, *Chitty on Bills, 8th ed., 482, 493*, this language is used: "The known bankruptcy or known insolvency of the drawee or acceptor of a bill or maker of a note, or his being in prison, or the notorious stopping payment of a banker, constitute no excuse, either at law or in equity, or in bankruptcy, for the neglect to give due notice of non-acceptance or non-payment, because many means may remain of obtaining payment by the assistance of friends or otherwise, of which it is reasonable that the drawer and indorsers should have the opportunity of availing themselves, and it is not competent to the holders to show that the delay in giving notice has not in fact been prejudicial. It has been observed that it sounds harsh, that the known bankruptcy of the acceptor should not be deemed equivalent to a demand or notice, but the rule is too strong to be dispensed with, and a holder of a bill has no right to judge what may be the remedies over a party liable on a bill. It is no excuse that the chance of obtaining anything upon the remedy over was hopeless—that the person or persons against whom that remedy would apply were insolvent or bankrupts, or had absconded. Parties are entitled to have that chance offered to them; and, if they are abridged of it, the law, which is founded upon the usage and custom of merchants, says they are discharged." This is almost verbatim the very language of the authorities, and especially of *Russell v. Langstaffe, 2 Dang. R., 515*; *Nicholson v. Ganship, 2 H. Black, 69, 612*. The same doctrine will be found in every author who has written on this

1860, *January*. HON. MR. JUSTICE ROBINSON.

Contract—Vendor and purchaser—Sale by sample—Entire contract—Acceptance by servant.

Where the defendant purchased a quantity of casks by sample, and the plaintiff, under the contract, delivered the casks to the defendant's store-keeper, who accepted the same, but was not aware of the nature of the contract.

Held—The receipt of the casks by the store-keeper was no acceptance. Even a knowledge by the defendant of his store-keeper having received the casks without an opportunity on his part to examine them would not amount to an acceptance.

THIS was an action of assumpsit brought to recover the price of sixty-six fish casks; it comes before the Court summarily, and consequently we have to determine the facts as well as the law.

The amount at issue is small, but the principle of law involved is important and of general application.

We think the evidence establishes that the plaintiff sold and the defendant purchased a number of casks as an entire contract, upon the condition that they were to be of corresponding quality with three exhibited as samples, and that only ten of the lot corresponded with such samples; that the casks were delivered by the plaintiff to the defendant's store-keeper, who had no knowledge of the agreement, and on the following morning, when the defendant first saw and examined them, he immediately rejected them as not according to sample, and gave notice to the plaintiff that he would not accept them, and requested him to remove them from his premises.

On these facts, we are of opinion that the contract being entire and not being fulfilled, the defendant was justified in rescinding it in toto as he did, unless he accepted the casks, which we think he did not; he swears that he was not aware of his storekeeper having received them the evening before, and if he were, the receipt, without having an opportunity of examining them, would not necessarily be an acceptance.—*P. Alderson B., Marlman v. Bellhouse, 9 M. & W., 600.*

No authority has been cited to show that in any entire contract where part of the goods corresponds with the sample or condition the defendant is bound to pay such part, the case of the *Campeachwood* was founded upon the express terms and does not apply to the present case. We therefore think there is no contract express or implied on which the plaintiff can recover and that judgment should be entered for the defendant.

1860, *January.* HON. SIR F. BRADY, C. J.*Practice—Pleadings—Defence—Set off—Mutual debts—Demurrer.*

In an action brought by the plaintiffs against the defendant as indorsee of a promissory note drawn by Bulley, Mitchell & Co., and indorzed to the bank, the defence set up was that the makers of the note had by deed assigned sufficient property to the bank to pay their indebtedness to the bank, and afterwards in trust to pay their other creditors; that the said note sued on was covered by the said trust, and the defendant claimed to set off the said amount due them under the said trust against the amount sued for. This plea was demurred to and the cause of special demurrer assigned was that the said debts were not mutual.

- *Held*—The defendant had no claim at law or in equity against the bank; to constitute such a set off as claimed he must have paid his endorsement, which he had not. The promise alleged in the plea was a mere *nudum pactum*, upon which no action could be maintained, and, consequently, did not establish any right to the set off pleaded.

THIS was an action of assumpsit brought by the bank as indorsee of a promissory note drawn by Bulley, Mitchell & Co., and endorsed to the bank by the defendant. The declaration contained a special count on the note and the common counts. The defendant pleaded the general issue, and also the following special plea:

“And for a further plea in this behalf the defendant saith that the plaintiffs ought not to have or maintain their said action against him, because he says that, to wit, on the twenty-third day of December, one thousand eight hundred and fifty-seven, at St. John's, aforesaid, one John Bulley, of St. John's, merchant, by deed of that date under his hand and seal, assigned and conveyed to the said plaintiffs five several parcels of land, situate and being in the district of St. John's, the property of the said John Bulley, and being of great value, to wit, of the said value of ten thousand pounds, upon trust after payment by the said plaintiffs out of the proceeds of the said lands of a certain sum of fifteen hundred and forty-five pounds currency, in the said deed mentioned, as due and owing by the said John Bulley and others to the said plaintiffs, with interest thereon, to pay, apply and appropriate the said lands, and the rents and profits thereof, to the due payment of all such other sums and direct and indirect liabilities of the said firm of Bulley and Mitchell, in the said declaration mentioned, as they, the said firm, had then incurred or might incur, or which might become due to the plaintiffs, within six calendar months

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THIS was an action of assumpsit brought by the bank as indorsee of a promissory note drawn by Bulley, Mitchell & Co., and endorsed to the bank by the defendant. The declaration contained a special count on the note and the common counts. The defendant pleaded the general issue, and also the following special plea:

“And for a further plea in this behalf the defendant saith that the plaintiffs ought not to have or maintain their said action against him, because he says that, to wit, on the twenty-third day of December, one thousand eight hundred and fifty-seven, at St. John's, aforesaid, one John Bulley, of St. John's, merchant, by deed of that date under his hand and seal, assigned and conveyed to the said plaintiffs five several parcels of land, situate and being in the district of St. John's, the property of the said John Bulley, and being of great value, to wit, of the said value of ten thousand pounds, upon trust after payment by the said plaintiffs out of the proceeds of the said lands of a certain sum of fifteen hundred and forty-five pounds currency, in the said deed mentioned, as due and owing by the said John Bulley and others to the said plaintiffs, with interest thereon, to pay, apply and appropriate the said lands, and the rents and profits thereof, to the due payment of all such other sums and direct and indirect liabilities of the said firm of Bulley and Mitchell, in the said declaration mentioned, as they, the said firm, had then incurred or might incur, or which might become due to the plaintiffs, within six calendar months

from the date of the said deed, which said deed was subject to a condition that if the said firm of Bulley, Mitchell & Co., should, within six calendar months from the date thereof, pay off to the said plaintiffs the said sums of fifteen hundred and forty-five pounds currency, in St. John's, aforesaid, and all other sum or sums of money, or other liabilities, that might become due from the said Bulley, Mitchell & Co., or for which they or any of them were or should be liable either directly or indirectly to the plaintiffs, in the meantime, as the same should become due or payable, together with interest at the rate of six per cent per annum, then the said deed should become void, and the defendant, unless that the said John Bulley wholly failed and made default in the performance of the condition for redemption contained in the said deed, that the said plaintiffs then and there accepted the said deed and undertook the performance of the conditions and trusts thereof, and entered upon and took possession of the said lands and received the rents and profits thereof, and applied the same and the said lands to the purposes of the said trusts; that the said promissory notes and the said sums of money in the said declaration mentioned, and for recovery of which this action is brought, were and are direct liabilities of the said firm of Bulley, Mitchell & Co. to the said plaintiffs within the terms, trusts and conditions of the said deed, and were due and payable to the plaintiffs within the six months in the said deed mentioned; that the amount received and realized by the plaintiffs from the said lands under the said deed, and in pursuance of the trusts thereof, before the commencement of this suit, greatly exceeded the said sum of fifteen hundred and forty-five pounds and interest thereon, and all other liabilities of the said firm of Bulley, Mitchell & Co. arising to the said plaintiffs within the said six months, including the said notes and the said several sums of money in the said declaration mentioned, and that the plaintiffs thereby, then and there, had and received to and for the use of the defendant a large sum of money, to wit, the sum of two hundred pounds and upwards, which they, the plaintiffs, then and there, promised to defendant to pay and apply to his use; and the defendant further saith that, of the sum of two hundred pounds, or so much thereof as may be necessary in that behalf, he, the defendant, is ready and willing, and hereby offers to set off and allow against and in discharge and payment of the said notes, and the said several sums in the said declaration mentioned, and sought to be recovered in this suit,

pursuant to the statute in such case provided; and this the defendant is ready to verify, and wherefore the defendant prays judgment if the plaintiffs ought to have or maintain their said action thereof against him, &c."

For this plea there was a demurrer, and the following causes of special demurrer were assigned: "That the said plea attempts to set off an alleged debt which cannot by law be set off against it; that the said debts are not mutual, &c." At the argument of this case it was not contended by Mr. Hoyles, counsel for defendant, that any equitable claim which the defendant might have under the mortgage of the bank could be the subject matter of set off, but he argued that the defendant, having, as he alleged, such an equitable claim, the promise by the bank to pay and apply to the defendant's use a portion of the funds realized under the mortgage, converted the demand of the defendant's into a legal debt against the bank, which he would be entitled to set off. There would be a great deal in this argument if it could have been shewn that the defendant had such an equitable claim against the bank, but it was manifest that he had no claim whatever, at law or in equity, against the bank, not having paid his endorsement, and, therefore, the promise alleged in the plea is a mere *nudum pactum*, as Mr. Little contended, upon which no action could be maintained, and, consequently, it did not establish any right to the set off pleaded. The demurrer must, therefore, be allowed.

Mr. Little and Mr. Pinsent for plaintiffs.

Mr. Hoyles, Q. C., for defendant.

the museum at £30 a year for three years, saying it was as good as the other considering the saving of fuel and gas. Witness wanted the expense of new stairs, rooms, gas, &c., they would allow nothing; spoke of their being good tenants. Boyd asked Seaton if the offer was a voluntary sacrifice on his part, if not, Boyd would not sanction it.

There was no chance of arrangement. witness did not agree to substitute £30 agreement for the £60 rent; told them they would have to take into consideration his expenses, and left them. Did not agree to subsequent agreement; did not give up the £60 agreement; a short time after Seaton called with an agreement for £30 a year. He did not wait to see if witness agreed or not, said "I knew you would be pleased," and went out. This was after conversation with Boyd and Seaton; witness did not agree to their proposal: witness made a sacrifice to let them have the rooms; might have had lodgers; they afterwards filled the rooms with curiosities. End of year witness sent account for £60; they did not pay.

Cross-examined.—Peter Tessier, Cozens, Walbank, Seaton, and William Boyd called in the first instance, James O. Fraser called after they closed. It was 28th January, 1859; said they were committee Reading Room and Library; they examined rooms; large room, dimensions 17 by 20; don't remember dimensions of other room, dimensions taken as correct as witness could; cannot say if correct; cannot tell whether I admitted dimensions incorrect or not; measurement 17 by 20, taken with a yard stick; took dimensions two weeks before, knowing they wanted them. Witness positive Walbank was present. Rent £60 a year, fire, light and attendance, allowing stairs and doors. one gassalier in centre of room, two burners, lights in hall and room; cannot tell the gas and coal account; cannot tell what attendance would cost; did not know. Committee occupation commenced almost immediately, no offer made for temporary use at £5 a month when rooms discovered not of size; small room not occupied as a reading room; occupied a week by witness's family at first; always ready for them; the excuse was it was not high enough for the cases; witness was never told room not large enough; carpenter at stairs a week after; gas-fitter's work done within a week. Seaton said, "you had better stop, joiner," about two days after; let gas-fitter go on; he said make them pay for the gas fittings, did not say they would not be taken; did not agree to become landlord to Mechanics' Institute for £30; never applied to Institute for rent; nothing to

do with them; considers himself entitled to £60 rent; sent account to Walbank and Seaton; did not apply to committee; witness's rent £66, house taken a mere shell; improved by witness from cellar to the garret; they had the best of the house; the coals and gas worth £20 a year.

Re-examined.—Witness was fitting for lodgers when rooms were taken; lodgers were better for witness; new stairs destroys hall; never heard dispute about dimensions until Seaton said I deceived him, he would then vote against me; never agreed to temporary use at £5 a month.

James Rooney, gas fitter, sworn.—Was employed by plaintiff. Seaton did not employ him; plaintiff sent witness to consult Seaton as to the gas-fittings for the Reading Room; after Merchant's fire, saw Seaton; he told me to make plain pendants, four lights, besides lights in hall and small room, that they would not be there beyond three years; large metre, 65s.; large light, 25s.; two small lights, 10s. each; gas for the year about £10; old metre worth about 20s. Had a conversation with Seaton and Walbank; they requested witness to go there. Seaton said, "we have taken the rooms;" wanted gas-lights; following morning witness went to work there.

Mr. Carter moves for non-suit, no proof against Walbank; contract, if any, with committee; non-joinder reserved.

Mr. Carter addresses the jury, and calls

James Seaton, sworn.—Witness went about town in search of rooms; wanted one of certain dimensions; saw plaintiff's rooms; plaintiff stated dimensions 17 by 20; consulted with committee, returned with Walbank and agreed for the rooms, not then aware that room was not of dimensions stated; called afterwards, said committee would not carry out agreement, that the expense of gas fittings ought to be paid, not all up there; plaintiff grumbled, nothing then said about dimensions; witness said he would endeavor to see plaintiff compensated; term three, five, or seven years, at Committee's option; met Rooney; sent him to plaintiff. Rooney returned for instructions; told him to have the expense as little as possible. The day mail signaled, Tessier said some place must be procured; advised taking plaintiff's rooms for a month or two, agreed with plaintiff for temporary use one room for a month or two, at £5 a month; plaintiff agreed to it; took printed poster there; gave it to plaintiff; plaintiff made no objection; put in some newspapers and furniture there; no occupation till 1st February; the poster issued after agreement of £5 a month; plaintiff afterwards said

he would hold to £60 agreement, and went on with stairs; room one foot shorter and one foot narrower than stated by plaintiff. Asked plaintiff about it; he said you had your own eyes to see it; thought the best way to give plaintiff the museum; witness was getting £25 a year for it; willing to give it up; asked Walbank to go with him, offered plaintiff museum at £30 a year, without fuel or gas, that the Mechanics' Institute should be his tenant, and not Committee Reading Room; witness said he would be as well off as at the £60 a year; plaintiff made no objection, appearing to assent, asked what about two months, produced memorandum of agreement, not signed by plaintiff; plaintiff never applied to witness for rent; received memorandum and assented; directed Coyell to move museum. Mr. Walbank no member of Committee, merely legal adviser; rent payable out of subscriptions

Cross-examined.—Witness repeated most of his examination. Don't know why Robertson did not sign the agreement; said he would agree, and wanted a note in writing; witness said, "I undertake to swear that plaintiff agreed."

Re-examined —Plaintiff assented to second agreement; never repudiated, they were in two months before museum moved; no occupation after first agreement until temporary agreement; told him to do no work only gas work, and of temporary use on the agreement for the Institute; not bound to give him the museum, only wished not to disappoint him. Walbank only advised, nothing further. The expenses of fuel and light would be over £30 a year. Plaintiff told witness previously he intended to alter stairs if he got tenant; expenses £15 utmost; £18 for stairs and gas-fittings. He accepted the Institute agreement but was not satisfied, the only objection the two month's fuel and light, no objection about stairs; rooms not worth £20 a year.

Mr. W. Walbank sworn —Witness, one of the defendants, at the time was not a member or subscriber of the Reading Room, personally he has no interest in the matter; committee consulted him. Present when Seaton told plaintiff his offer accepted, not amongst the number of those that went to plaintiff's in the first instance. Met Seaton; went with him to see rooms; told plaintiff Committee had agreed to take the rooms; never used the words "we will take"; never said "I would." Library committee distinctly named; told plaintiff he must be particular to conform to agreement, otherwise they would pay no rent. Did not make himself a contracting party; gave

Rooney no directions; after difference as to measure gave plaintiff notice not to go to expense, room not the size represented, could not be used. He admitted that the room was not the size stated; said that was their look out. He threatened to hold to first agreement.

He said he would take it; he would do it. This was after two or three days negotiations.

Re-examined.—Plaintiff positively agreed.

William Boyd sworn.—Was present last arrangement about museum. Seaton agreed to give up museum to satisfy plaintiff to prevent law-suit; understood arrangement satisfactory to plaintiff. He did not accept it in express terms; he did not say he would not accept.

Cross-examined.—Do not remember his acceptance unless his going out and not objecting. Something said at the time about fuel and light for two months

Mr. Hoyles closes.

Mr. Justice Little charged the jury.

That this action was brought to recover the sum of £60 for two rooms to February, 1860, and submitted to the jury the following questions: Who are the parties liable, are the defendants the real parties; if the defendants be liable, then what was the contract? If they were not the contracting parties, but acting on behalf of the St John's Library and Reading Room, they are then not liable. If, on the contrary, they were the actual parties, the jury were to enquire what was the subsisting contract; the facts of the case were not clear, there being a conflict of testimony between the parties. It was the duty of the jury to inquire and decide as to whom they would give credit. His lordship read over the evidence, and commented on several parts. The defendants' entry under a new agreement would not aid the first agreement. If the jury believe that the plaintiff was persuaded that Seaton and Walbank contracted with him as *bona fide* parties, they would be liable. It would be desirable if the parties really liable would consent to the jury finding what was the fair contract; if the defendants are not liable somebody must be under the first contract. If Seaton and Walbank really contracted, they are liable; if not, there must be a verdict for the defendants. If they took possession under the final agreement they would not be liable for the £60 or damages. Defendants further state although the room was occupied, it was occupied under the last agreement with Mechanics' Institute. If the defendants entered under

the temporary agreement for £5 a month, ending with the contract for £30 a year for the museum. In that case the defendants are not liable. The whole case is, are the defendant's liable and for what rent, irrespective of whether these parties are indemnified or not?

Mr. Carter objects to the jury assessing the rent due irrespective of the liability of the defendants.

Verdict for the plaintiff for £43 6s. 8d. cy.

On a subsequent day a rule nisi was obtained for a new trial. When the parties having been heard the following judgment was delivered :

HON. MR. JUSTICE LITTLE:

In this case an application has been made by Mr. Carter on behalf of the defendants to set aside the verdict obtained by the plaintiff, on the ground that the cause was contrary to evidence, first, as to the amount of damages accorded by the jury; and secondly, as to the liability of Mr Walbank under the circumstances.

The action was brought by the plaintiff, to recover £60 for one year's rent due last February, for two rooms in his house in water-street, in this town, used for about two months by the St. John's Library and Reading Room Committee, and afterwards as a Museum. The plaintiff swore that the defendant and other gentlemen, representing themselves as that committee, called at his house and examined his rooms, that he told them his terms; that in the afternoon of the same day the defendant's called on him with Mr. Couzens and said they had decided on his rooms. The plaintiff said he would let them for three, four, five or seven years. Defendants replied they had agreed to take them for three, five, or seven years, at £60 a year, the plaintiff providing gas, fuel and attendance, to clean the rooms, and to put up a stairs leading to rooms. He agreed to these terms. That a few days afterwards Mr. Seaton called again and told him two of the committee were not pleased with the bargain, and not to allow the carpenters to commence with the stairs, but the gas fitter might go on with his work; that plaintiff refused to do this; that the reading room furniture was removed into the rooms, and after two months the defendants, with Mr. Boyd, met the plaintiff, by appointment at Mr. Seaton's office, and offered him £30 a year for the rooms without gas, fuel or attendance; that he objected to take this offer, as no

arrangement was made for the expenses of putting up stairs and gas fitting, which he said would amount to about £40 by the time he removed stairs, which were inconvenient for his general purposes. James Rooney, the gas fitter, swore that the defendant met him in the street about February, 1859, and Mr. Seaton told him, that they had taken plaintiff's place as a reading room; and that he was to go to plaintiff's for the purpose of introducing the gas into it; and on the following day he went to the plaintiff, and that he put up the gas fitting as directed by Mr. Seaton, costing about £5 10s. It further appeared that the plaintiff furnished a bill to the defendants at the end of the year for £60, but no rent has been paid.

On the part of the defendants it was proven by the defendants that Mr. Walbank was not with the committee when they first inspected the rooms; that he was not a member of the committee, and only acted as their legal adviser in the affair; that after the rooms had been inspected, he met Mr. Seaton in the street and accompanied him and Mr. Cozens to the plaintiff's house, and told him to do what he (Mr. Seaton) required or there would be no lease, as Mr. Seaton swore, or as Mr. Walbank swore that Mr. Seaton said to plaintiff the committee had agreed to take the rooms for £60 a year, and Mr. Walbank said to plaintiff to be particular in carrying out the agreement, otherwise he would not get his rent, or something to that effect; that the term was three, five, or seven years; that the objection was raised after by some of the committee to the room, and Mr. Seaton then went to plaintiff and told him so, and not to put up the stairs, but to go on with the gas fittings, and Mr. Seaton stated that he offered him £5 a month for the large room for two months, which the plaintiff agreed to take, and that it was used as a reading room by the committee for two months; that in the meantime the stairs were got up against Mr. Seaton's objection, the plaintiff stating after the place had been occupied that he would hold the defendants to the original agreement; that at the end of the two months a new agreement was proposed by Mr. Seaton in presence of Mr. Walbank and Mr. Boyd, to take the place for the use of the Museum department at £30 a year from the date of the original occupancy; that the plaintiff assented to this, but grumbled as Mr. Seaton says about the expenses of fuel and light, but Mr. Boyd says plaintiff looked for something beyond the £30, whether for fuel and light or, as for the stairs, he did not remember, while Mr. Walbank states that the plaintiff did

not express any dissatisfaction after the final settlement for £30 a year was made; that Mr. Seaton was a member of the committee, but only acted on behalf of the whole body and did not hold himself personally responsible; that he gave the plaintiff a letter signed by himself on behalf of the committee, containing the terms of £30 a year, and that neither of the defendants used the expression stated by the plaintiff that they had agreed to take the rooms, but they said the committee had.

The jury, after weighing the conflicting statements of the parties and their witnesses, first considered that the defendants were liable for the rent, and gave a verdict, not for £60, but for £43 6s. 8d., which would appear to cover a year's rent and fuel and light for two months; also an allowance for the expenses so that the yearly rent in future from the close of the first year may be fixed at £30. On the part of the plaintiff, Mr. Hoyles has opposed this motion, on the ground that the whole question was purely for the jury; that there is evidence of a reliable character to sustain their finding; that the non-joinder of the other members of the committee should have been pleaded in abatement, and it is no ground for a new trial; and the alleged misjoinder of Mr. Walbank has been disposed of by the jury, who considered rightly on the evidence that the credit was given to him as well as to the other defendant, and by his conduct he made himself a contracting party. And as to the amount, that was likewise peculiarly a matter for the decision of the jury.

After carefully considering the case, I feel that I am bound to refuse to disturb the verdict for the reasons urged by Mr. Hoyles. The evidence is conflicting; the credibility of the witnesses was left to the jury; no imputation of a deliberate want of veracity has been cast on any of them; in fact, they are all too respectable to suppose that any of them would wilfully misrepresent the facts. I cannot undertake to say that the verdict is excessive, under all the circumstances. In *Lacey vs. Forrester*, 3 Dowl, 668, a new trial was refused where the credibility of a witness was left to the jury, and they found a verdict against his evidence, although there was no evidence to impeach his credit; and it is laid down that, in general, the Court will not grant it if there is any evidence to warrant the finding of the jury; but if the verdict is very unsatisfactory, they might, 2 Scott, N. R., 548; and where the evidence has been given on both sides, a new trial will seldom be granted unless the evi-

dence against the verdict very strongly preponderates, *2 Str.*, 1142. I must therefore refuse the application for a new trial

Mr. Hoyles for plaintiff.

Mr. Carter for defendant.

MUIR ET AL v. MCBRIDE ET AL.

1860, *January*. BRADY, C. J.; ROBINSON, J.; LITTLE, J.

Practice—Rule nisi—New trial—Misdirection—Marine insurance—Mutual Insurance Club—Construction of rules—Waiver.

The articles of a mutual insurance association contained, amongst other rules:—

(a) "That in addition to the survey upon which a vessel may be accepted for admission into the association, said vessel, when within reach of the surveyors of the association is to undergo a survey"; (b) "The duty of the surveyors, when requested by a note from the secretary, is to see that the vessel proposed for admission has, amongst other things, a third heavy anchor on all but a sealing voyage," &c., &c., &c.

In February, 1859, the plaintiff's vessel, *True Blue*, was admitted into the association and received a certificate, under which she sailed and was lost in the month of November. She had been at St. John's, "within reach of the surveyors," for a fortnight, but her owners did not give notice thereof to the association.

In an action brought to recover against one of the association his proportion of the insurance, the jury found for the plaintiff. On a rule *nisi* to set aside verdict it was contended, (1) That the want of notice of the arrival of the *True Blue* "within reach of the surveyors," which the owners were bound to do was a warranty or condition precedent to their recovery; (2), that she had not on board three heavy anchors at the time of the loss, which was also a warranty under the 31st rule.

Held—(Brady, C. J., differing, discharging the rule)—The words of neither rule constitute a warranty. The rules were merely directory to the committee of the club as to what they were to point their attention, and not conditions precedent on the assured, nor of such a character as to invalidate his insurance.

THIS was an action of assumpsit to recover £95 8s. 1d. The plaintiff's case was that he, on the 25th February, 1859, insured his vessel, the *True Blue*, in the St. John's Mutual Insurance Association, of which defendants were members, for the sum of £760 currency, the vessel being valued at £950 currency,

upon the terms and under the rules of the association. In consideration of his paying the premium the defendants bound themselves to bear reciprocally with the other insurers their proportion of any total loss of the ship arising from the wind, seas, rocks, shoals, ice, and all other dangers and accidents of navigation, as well as from fire, lightning, pirates or thieves, provided the plaintiff had done his duty to prevent the same during the period prescribed in the rules of the club. The owners of the vessel had received a certificate of survey and approval from three of the surveyors and sailed from St. John's to Swaine Island, in the northern district of the island, on the 6th November, 1859, laden with provisions, cattle and outfits for the fishery, on which voyage, two days after her departure, she was lost at Freshwater Bay. The fact was the vessel had not been surveyed, and the defendants contended that plaintiff, having failed to comply with the 21st and 31st rules of the club, he was without remedy for the loss; the *bona fides* of the loss and general seaworthiness of the vessel were not disputed; and the plaintiff had contributed prior to and since the loss to other risks, and the committee had, before the vessel had become a total wreck, proposed to the plaintiff to send assistance to her rescue; the plaintiff, therefore, contended that these acts operated as a waiver of the strict letter of the rule; that the certificate of the survey bound the defendants. After argument, the question of waiver was left to the jury, under the charge below from Mr. Justice Little; the points raised by the defendants being reserved. The 21st and 31st rules are as follows:—

“XXI.—Should there be application from the owners or agents of vessels belonging to or at present lying up in the outports of this island for their admission into this association, it shall and may be lawful for the committee to receive such vessels upon the best information they can obtain as to their condition and value, and fix the amount at which the said vessels shall be insured. Such vessels are, nevertheless, to undergo a survey when within the reach of the surveyors of the association, of which the owner or agent shall give notice.”

“XXXI.—The duty of the surveyors is, when requested by a note from the secretary, to examine the vessel proposed for admission, and see that she is well found in anchors, cables and sails (a third heavy anchor on all but a sealing voyage), that she has good braces on her stern-post, and is supplied when on

a sealing voyage with a good spare rudder, fully mounted, together with every other requisite; and particularly to ascertain that the hull is tight, staunch, strong, and in all respects fit to encounter the dangers and difficulties of the proposed voyage; and that the master proposed is a person competent to take charge of such vessel. And, having satisfied themselves that no impediment exists against her being received, they shall furnish a certificate of her being accepted, stating the sum they value her in, which certificate shall be security to the owner, and as valid as a policy issued by Lloyds'. On the sealing voyage one good punt shall be considered as belonging to and included in the value of the vessel; each vessel on that voyage shall be provided with twenty-five or thirty pokers, fitted with start and rings."

His Lordship Judge Little charged the jury: The action was brought to recover £96 8s. 1d., defendants' proportion of insurance for the plaintiff's loss of his vessel, the *True Blue*, which had been insured in the "St John's Marine Insurance Association," of which defendants were members, and which vessel had been lost on 8th November, 1859. It was only fair that when persons enter into contracts of this sort, where there was a mutual obligation, that the terms of the contract should be strictly observed; on the other hand, the insured pays his premium and the insurers are responsible for the loss of the property insured, but at the same time the terms of the contract must be strictly observed by both parties. The defendants dispute the claim, alleging that plaintiff failed to comply with the rules of the association, inasmuch as his vessel had not a third anchor and had not been properly surveyed. The plaintiff relies on three grounds: 1st, he says he received his certificate and paid his contributions, which were a waiver by the defendants of any obligation cast upon him; 2nd, that the association, having endeavoured to save the vessel, virtually acknowledged their liability, and shews that they did not contemplate to insist upon a strict compliance of the rules. The first issue the jury had to determine was whether there was honestly and *bona fide* a waiver by the defendants of the rules of the club. If they found there was not, they would receive further instructions from the Court; if they found there was a waiver, they would find for the plaintiff.

The jury, having retired for a short time, informed the Court that they decided there was a waiver and found a verdict for the full amount.

On a subsequent day a rule nisi was obtained to set aside the verdict, to which cause was shown, when the following judgments were delivered :

HON. MR. JUSTICE ROBINSON :

The plaintiffs and defendants were members of a Mutual Insurance Association in St. John's, and this action was brought to recover the defendants' proportion of the sum of £670, being the amount insured in the association on the *True Blue* by plaintiffs.

The vessel was insured on the 26th February, 1859 : at that time she was lying up in Bonavista Bay, and was received into the association pursuant to the 21st rule, which provides that "should there be application from the owners of vessels belonging to or at present lying up in the outports, for their admission into this association, it shall be lawful for the committee to receive such vessel upon the best recommendation they can obtain as to their condition and value, and fix the amount at which the said vessel shall be insured ; such vessels are nevertheless to undergo a survey when within the reach of the surveyors of the association, of which the owner shall give notice" ; no policy is issued by the association, but the certificate of survey is declared and considered to be "security to the owner, and as valid as a policy issued by Lloyds."

The following certificate was given to the plaintiffs of the insurance of the *True Blue*, signed by the three surveyors, and countersigned by the secretary.

"We, the undersigned surveyors of the St. John's Mutual Marine Insurance Association, have this day surveyed the brigantine *True Blue*, Winsor, master, which we approve of and value at nine hundred pounds, of which seven hundred and sixty pounds is insured in this association,—James McLoughlan, Edward White, William Woodford, surveyors. Entered. J. O. Fraser, St. John's, 25th February, 1859."

This appears to be the only form of certificate used by the association, and is given in all cases. The *True Blue* sailed under this certificate from the date thereof until the month of November, when she was lost near St. John's—and contributed her proportion for sundry losses incurred during that period.

She had been at St. John's and within reach of the surveyors for a fortnight, but her owners did not give notice thereof to the association, and she was not there surveyed, the plaintiff, Muir,

in his evidence, stating that he had the certificate and forgot to give any notice.

Evidence was given at the trial, (although objected to by Mr. Hoyles) that she was sufficiently found with anchors at the time of her loss (but had not "three heavy anchors,") and was seaworthy, and it was admitted that her loss was bona fide.

The grounds upon which payment of her insurance was resisted by Mr. Hoyles on behalf of the underwriters were:

1st.—That the plaintiffs had failed to give notice of the arrival of the *True Blue* within the reach of the surveyors in October, which he contended they were bound to do, as a warranty or condition precedent to their recovery under the 20th rule.

2nd.—That she had on board three heavy anchors, at the time of loss, which was also, he contended, a warranty under the 31st rule, which is as follows:

"The duty of the surveyors is, when requested by a vote from the secretary, to examine the vessel proposed for admission, and see that she is well found in anchors, cables and sails (a third heavy anchor on all but a sealing voyage) and having satisfied themselves that no impediment exists to her being received they shall furnish a certificate of her being accepted, &c.

Mr. Carter, on behalf of the plaintiffs, however contended as to the first point, that the 21st rule did not constitute a warranty to give notice of the arrival of the vessel; and even if it did, that the defendants had by their conduct, as given in evidence, waived it; and as to the second point, that the 31st rule was simply directory to the surveyors, and did not create any warranty on the plaintiff's part, the only question being one of seaworthiness.

My learned brother, Judge Little, directed the jury amongst other things, to consider whether the defendant had waived the observance of those two rules, and they found that there was such a waiver, and delivered a verdict of £95 5s. 7d. for plaintiffs.

Mr. Hoyles obtained a rule to set aside that verdict, and enter a non-suit upon the grounds taken at the trial of breach of warranties, or to have a new trial upon the ground of misdirection, there being no evidence to support the supposition of a waiver.

To this rule cause has been shown. We have had the benefit of all the arguments; and I have given much and earnest consideration to the questions raised, which are somewhat in-

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HON. MR. JUSTICE ROBINSON :

The plaintiffs and defendants were members of a Mutual Insurance Association in St. John's, and this action was brought to recover the defendants' proportion of the sum of £670, being the amount insured in the association on the *True Blue* by plaintiffs.

The vessel was insured on the 26th February, 1859 ; at that time she was lying up in Bonavista Bay, and was received into the association pursuant to the 21st rule, which provides that "should there be application from the owners of vessels belonging to or at present lying up in the outports, for their admission into this association, it shall be lawful for the committee to receive such vessel upon the best recommendation they can obtain as to their condition and value, and fix the amount at which the said vessel shall be insured ; such vessels are nevertheless to undergo a survey when within the reach of the surveyors of the association, of which the owner shall give notice" : no policy is issued by the association, but the certificate of survey is declared and considered to be "security to the owner, and as valid as a policy issued by Lloyds."

The following certificate was given to the plaintiffs of the insurance of the *True Blue*, signed by the three surveyors, and countersigned by the secretary.

"We, the undersigned surveyors of the St. John's Mutual Marine Insurance Association, have this day surveyed the brigantine *True Blue*, Winsor, master, which we approve of and value at nine hundred pounds, of which seven hundred and sixty pounds is insured in this association,—James McLoughlan, Edward White, William Woodford, surveyors. Entered. J. O. Fraser, St. John's, 25th February, 1859."

This appears to be the only form of certificate used by the association, and is given in all cases. The *True Blue* sailed under this certificate from the date thereof until the month of November, when she was lost near St. John's—and contributed her proportion for sundry losses incurred during that period.

She had been at St. John's and within reach of the surveyors for a fortnight, but her owners did not give notice thereof to the association, and she was not there surveyed, the plaintiff, Muir,

in his evidence, stating that he had the certificate and forgot to give any notice.

Evidence was given at the trial, (although objected to by Mr. Hoyles) that she was sufficiently found with anchors at the time of her loss (but had not "three heavy anchors,") and was seaworthy, and it was admitted that her loss was bona fide.

The grounds upon which payment of her insurance was resisted by Mr. Hoyles on behalf of the underwriters were :

1st.—That the plaintiffs had failed to give notice of the arrival of the *True Blue* within the reach of the surveyors in October, which he contended they were bound to do, as a warranty or condition precedent to their recovery under the 20th rule.

2nd.—That she had on board three heavy anchors, at the time of loss, which was also, he contended, a warranty under the 31st rule, which is as follows :

"The duty of the surveyors is, when requested by a vote from the secretary, to examine the vessel proposed for admission, and see that she is well found in anchors, cables and sails (a third heavy anchor on all but a sealing voyage) and having satisfied themselves that no impediment exists to her being received they shall furnish a certificate of her being accepted, &c.

Mr. Carter, on behalf of the plaintiffs, however contended as to the first point, that the 21st rule did not constitute a warranty to give notice of the arrival of the vessel; and even if it did, that the defendants had by their conduct, as given in evidence, waived it; and as to the second point, that the 31st rule was simply directory to the surveyors, and did not create any warranty on the plaintiff's part, the only question being one of seaworthiness.

My learned brother, Judge Little, directed the jury amongst other things, to consider whether the defendant had waived the observance of those two rules. and they found that there was such a waiver, and delivered a verdict of £95 5s. 7d. for plaintiffs.

Mr. Hoyles obtained a rule to set aside that verdict, and enter a non-suit upon the grounds taken at the trial of breach of warranties, or to have a new trial upon the ground of misdirection, there being no evidence to support the supposition of a waiver.

To this rule cause has been shown. We have had the benefit of all the arguments; and I have given much and earnest consideration to the questions raised, which are somewhat in-

tricate and involved, owing in a great measure to the language in which the rules of the Association are drawn.

The plaintiffs who had insured their property, who have paid their premiums, who have incurred a loss by a peril insured against, and have not been guilty of any bad faith, are *prima facie* entitled to the benefit of their insurance, unless the defendants are exonerated by some clear rule of law from discharging what would otherwise be a righteous demand.

Whether it is liberal in the Association to raise technical objections to the payment of a *bona fide* loss is no concern of mine; if the objections are valid in law the underwriters are entitled to have the benefit of them, as a matter of right.

It must be remembered that a warranty or condition precedent, as a general rule, admits of no excuse, no latitude, no equivalent. It must be fulfilled to the very letter, or the insured loses the benefit of his insurance from whatever cause the loss may arise; however penal the warranty may prove upon the insured, the rules of law as well as the interests of commerce required that it be rigidly upheld by the Court, but the same rules forbid that it be extended by implication.

It is an inflexible and universal principle that nothing can amount to an express warranty in an insurance, unless it be inserted on the face of the policy, or form part of the rules, which are expressly referred to on the face of the policy. It might be said that surely the insured must be supposed cognizant of the rules of the Association, but the case of *Graham v. Barras, 5 B. and Ad., 1011*, tends strongly to shew that rules of a Mutual Insurance Club are not to be considered as imported into the policy, unless expressly referred to in the policy; even a written paper wrapped up with and enclosed in the policy when brought to the underwriters for subscription, and a paper waivered to the policy, have respectively been adjudged not to amount to a warranty. (*Pawson v. Barnevelt, Bize vs. Fletcher.*) Now, on the certificate or policy in this case, I find nothing either directly or indirectly referring to any notice or respecting survey or anchors; nor is there reference to any rules. I only see on the face of the certificate that the officers of the Association declare under their hands, in the authorized form, that the *True Blue* has been surveyed, has been approved, and is insured for £700; the truth of which they now deny, when a loss has occurred, whilst they retain the advantage of the plaintiff's contributions received only on the ground that they were insured. But supposing the rules of the association

had been by express reference imported into the policy, I should then have to consider whether the 21st rule operated as a warranty, for it is the province of the Court to determine what is or is not a warranty.

It is not every undertaking or covenant by the insured which amounts to a warranty, and on this subject I cannot do better than adopt the language of the very learned commentator on the laws of England, Mr. Sergeant Stephen, 2 vol., p. 56: "A particular clause in a mutual agreement may be of such a nature that the breach of it may not be sufficient to excuse the opposite party from performance on his side, though it may entitle him to an action for damages; and whether any special clause is to be construed in this latter mode, or as a condition precedent, turns less on any technical rule of interpretation than on the intention fairly imputable to the parties in each particular case.

That may be safely deemed a condition precedent which constituted the consideration for the original promise, and was a necessary ingredient in enabling the underwriters duly to appreciate the risk they were required to undertake. As Mr. Justice Maule says in *Kemble v. Mill*: "'In deciding whether a stipulation in an agreement is precedent or concurrent, the Court will be guided by what appears to have been the original intentions of the parties.'" and applying those tests to the present case, I should find it difficult to say that a survey which might or might not take place after the risk had been commenced, and which in this case could not have taken place till October, could be considered, to any extent, as an element in estimating the original contract completed in the February preceding. I am far from denying that the underwriters could have made the survey indispensable, so that a neglect thereof would operate as a defeasance of the insurance; but it seems to us reasonable to suppose, that if they had so intended they would have used the language ordinarily employed for such purpose, thus in the rules of the Mutual Insurance Clubs of Sunderland and of Newcastle, referred to respectively in the cases of *Morrison v. Douglas*, and *Stewart v. Wilson*, there are clauses which provide for surveys pending the insurance, but such clauses also required the insured to supply any deficiency the surveyors may direct on pain of "being uninsured," which provision is not here.

Giving, then, a reasonable construction to the 21st rule, according to the original intention of both parties fairly imputa-

ble to them, I do not suppose that the underwriters intended anything so unreasonable as that a clause should operate as a warranty, which did not constitute an element in the original consideration, which contained no negative terms nor penal consequences, and from the observance of which they could practically derive no benefit; for, supposing that notice had duly been given, and that the surveyors had, in October, gone on board and surveyed the *True Blue* and were wholly dissatisfied with her, what then? The association could not cancel or vary their insurance, unless, indeed, there was fraud, which is not imputed here. Suppose they had ordered the insured to put on board more or better sails, more or better boats or rigging, &c., &c., the assured need not have paid the least attention to such orders, provided he could prove in the case of loss that the vessel was sufficiently found, and was seaworthy, facts which he must prove as part of his case or fail to recover.

An undertaking that a vessel shall not deviate, or shall sail with convoy, or shall have a certain compliment of men, &c., &c., are ingredients in the primary consideration. They constitute the foundation of the original insurance and enable the underwriter to estimate the risk he incurs, and are rightly deemed warranties: but the duty of giving to the underwriters, subsequent to the inception of the risk, a mere notice, which, if given, would not enable them to avoid or diminish their risk or in any respect to alter their position, is a very different matter.

This view seems to have been taken by the Court of Common Pleas in the case, *Primm v Read, C W. & G.* That case, it is true, was determined on different grounds, but the question incidentally arose whether giving notice, pending the risk, of a change of business on the insured premises was a warranty, and Chief Justice Tindall used expressions which seem very applicable to the present case, "there is a material distinction between matters arising subsequent and prior to the contract of insurance. How can an alteration in the business be material to be made known to enable the company to judge of a risk they have undertaken? Supposing the assured had given notice, how would it have benefitted the company?"

I am, therefore, of opinion that the words at the end of the 21st rule, respecting the survey, do not amount to a warranty; and whatever effect they might have as a substantial covenant, on which I offer no opinion, they present no bar to the plaintiff's recovery in this action.

Upon the second objection—that the want of three heavy anchors was a breach of warranty—my judgment is governed as well by the fact that the policy does not contain any reference to anchors, or to any rule which does refer to anchors, as by the decision of the Court of Queen's Bench in the case *Morrison v. Douglas, 3 A. & E., 396*, and of this Court in the case *Rogerson v. Spracklin*. In the former case the plaintiff was insured in a Mutual Association at Sunderland, one of the rules of which (and to which express reference was made) was that the assured should have "chain cables properly tested;" it was contended that the want of such chain cables was a breach of warranty, but Lord Denman and the whole Court held that such rule was merely directory on the committee as to what they were to point their attention to, and did not constitute a warranty, and if it were otherwise it would only be in the nature of a want of seaworthiness which would be a question for the opinion of the jury."

As I think that neither of the clauses referred to amounts to a warranty, it is not necessary for me to determine whether there was evidence of a waiver, but I am inclined to agree with Mr. Hoyles that there was not. Whether the certificate given by the surveyors on the 25th February that the vessel was surveyed, approved of and insured, operated as an estoppel on the association, or a dispensation of a future survey, are not the questions here raised; but simply whether there was evidence of a waiver of a breach. Now, a waiver pre-supposes a breach, a knowledge of such breach, and an intention to forego the penalty of such known breach. A solemn agreement ought not lightly to be set aside, or a party suffered to escape from the consequences of its violation, by loose acts which might not be done with any design of waiving penalties incurred. I do not find that the association, or the managing committee of the association in their collective capacity, did any act whatever respecting the loss of the *True Blue*. What the plaintiffs rely upon are acts of some of the members of the committee in their individual capacities, which certainly ought not prejudice the association of the defendants, and could not have the effect of binding them to a new contract. On the whole case, however, I think the plaintiffs are entitled to their insurance, that the verdict should not be disturbed, and that the rule ought to be discharged.

HON. MR. JUSTICE LITTLE:

An incorrect report of the judge's charge was published at the time, and the points of Judge Little's charge are therefore given now from his notes. After referring to the facts of the case as given in evidence, a preliminary issue was left to the jury for their opinion, which was whether the defendants waived the special provisions of such of the rules as they insist on as forming conditions precedent, especially referring to the 21st and 31st rules. The plaintiffs rely on these grounds to show a waiver, viz.: 1st, the certificate of insurance stating that a survey had been held on the vessel; 2, that the payments by plaintiffs towards losses occurring before, but not demanded or liquidated until after the loss of the *True Blue*, being her contribution to such losses; 3, that the defendants co-operated with other members of the committee to save the vessel when in danger, after she had left St. John's without being actually surveyed. If they considered these grounds under the evidence sufficient to satisfy them of an intention to waive these rules, they would say so; or if not sufficient, they would say so; and in either case, they would receive further directions. The jury found this question in the affirmative. They were then directed to find a verdict for the plaintiff, which was accordingly entered subject to the motion of defendant's counsel for a non-suit on the points reserved.

In this case a rule *nisi* has been granted to set aside the verdict given for the plaintiffs for the amount of the defendant's contribution of the insurance on the plaintiff's vessel *True Blue*, insured by the St. John's Mutual Marine Insurance Association, of which both the parties to this action were members, and enter a non-suit or grant a new trial on these grounds: 1, for non-compliance, by the plaintiffs, with the 21st and 31st rules of the Association, in not having had the said vessel surveyed upon her arrival in St. John's "when within reach of the surveyors" of the association after her insurance was effected; 2, for not having a third heavy anchor on board when she was lost; and 3, for misdirection on the part of the judge, who charged the jury in leaving to their decision the question as to whether these conditions were or were not waived, instead of the Court deciding that question; the jury decided it in the affirmative, and then gave a general verdict for the amount claimed by the plaintiffs.

The plaintiffs rely on the following grounds to uphold their verdict: 1, That the certificate of the surveyors, stating "that

we the undersigned surveyors of the St. John's Mutual Marine Insurance Association have this day surveyed the brigantine *True Blue*, Winsor, master, which we approve and value at £950, of which £760 is insured in the Association. Entered. J. O F., St. John's, Feb. 26, 1859. (Signed) Jas. McLoughlan, Edward White, William Woodford, surveyors," is conclusive evidence that the vessel was surveyed and duly accepted, and parol evidence of no survey having been held on her will not avail against the words of the certificate; 2, admitting she had not been actually surveyed, and had not a third heavy anchor on board, the rules specifying these matters were not warranties or conditions precedent to their right to recover; and 3, if they even were, that a compliance with them has been waived, one, by the granting of the certificate; two, by the plaintiffs having paid contributions in respect of the *True Blue* after her loss for other previous losses of vessels insured in the Club; and three, by the defendants and other members of the committee co-operating to try and save the *True Blue*, when in peril after she left St. John's.

The 21st rule prescribes that it should be lawful for the committee to receive vessels belonging to or lying up in the outports of this island "upon the best information they can obtain as to their condition and value, and fix the amount at which the said vessel shall be insured. Such vessels are, nevertheless, to undergo a survey when within reach of the surveyors of the Association, of which the owner or agent shall give notice." The 31st rule referring to the duties of the surveyors states they shall "examine the vessel proposed for admission, and see that she is well found in anchors, chains and sails (a third heavy anchor on all but a sealing voyage)" &c., and that "having satisfied themselves that no impediment exists against her being received, they shall furnish a certificate of her being accepted, stating the sum they value her in, which certificate shall be security to the owner and as valid as a policy issued by Lloyd's."

Now, instead of the committee taking the risk upon the best information they could obtain and granting a policy expressly subject to a survey of the vessel under the 21st rule, an absolute certificate of an actual survey according to the 31st rule was granted by the surveyors to the plaintiffs, and which was signed by them and the secretary, and approved of by the committee, and the positive terms of which are attempted to be controlled by the sworn statement of the secretary that such

was the only form of certificate issued by the Association, whether the vessel insured was in St. John's or an outport. This is the document which the 31st rule declares "shall be security to the owner and valid as a policy issued at Lloyd's." Let us, then, suppose that this was a policy issued at Lloyd's, containing an admission that the vessel had been duly surveyed, and parol evidence is offered and admitted, subject to the objection taken by the plaintiff's counsel to its admissibility, that the vessel had not, in fact, been surveyed, and the jury discard the parol evidence and hold the defendants to the admission deliberately made in their policy. Such in effect, in my opinion, is the present case. Now, it is clearly laid down in 1 Arnold on Insurance, p. 64, "that policies are governed by the same rules of construction as other mercantile instruments;" and in p. 78 and 1316, "A resort to parol evidence, however, is only permitted where the language of the policy is either obscure or equivocal; such evidence will never be admitted to set aside, vary, control, or contradict its plain and unambiguous terms."

In 1 Camp, 532, it is decided that though, in London, the premium is never paid until long after the policy is effected, yet the acknowledgment of the premium in the policy prevents the underwriters from recovering it from the assured; and in Parfitt v. Thompson, 13 M. & W., 392, it was determined that a clause in a policy admitting the ship to be seaworthy for the voyage when she sailed precluded the underwriters from any defence, on the ground of unseaworthiness. Many other authorities to the same effect could be cited. But it has been urged that the terms of the printed rules must control the words of the certificate. I should not assent to that view, even if rules were printed on face of the policy, instead of being on a detached sheet, and not referred to in the certificate, which "stands in the place of a policy." In 1 Arn., 79, it is said that "if there is any doubt about the sense or meaning of the whole, the words superadded in writing are entitled to have a greater effect attributed to them than the printed words inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning."

It is not denied that the vessel was seaworthy on leaving St. John's, that there is no fraud in the claim, and that the loss was bona fide. A survey before she left this port, a few hours prior to her loss, would therefore in reality have been a matter

of form, and it is not contended that if she had been actually surveyed at the taking of the risk in Feb., 1859, a second survey would have been necessary in October or November following under the circumstances. But I do not rest my opinion of the verdict altogether on these grounds.

It appears to me that the stipulation in the 21st rule referring to the survey, as it was presented in evidence, is not in point of law a warranty, for no statement that is not actually written on the very face of the policy itself, will be construed as a warranty.—1, *Arnold*, 490. An express warranty is a stipulation inserted in writing on the face of the policy on the literal truth or fulfilment of which the validity of the entire contract depends—1, *Arnold*, 577. But, if a warranty forms part of any rules or conditions, which though extensive to the policy are referred to therein, it will be considered as incorporated with the contract, and its literal fulfilment be has strictly enforced as though it were actually inserted in writing on the face of the instrument 3 B. & A. 314. Now, the certificate, which the 31st rule states "shall be security to the plaintiffs and as valid as a policy at Lloyd's," contains no reference to the rules, and unless they and the certificate can be read together as the policy, I do not see how any of the rules can be construed as express warranties. But supposing they did form the policy, and the certificate were to be controlled in every particular by them, it is contended with much force on the authority of *Stevenson v. Douglas*, that rule 21st partakes of the character properly attached, according to my opinion, to rule 31st, which is only directory to the committee. It is certainly clear that all such stipulations as those mentioned in the former rule are not under every state of facts to be construed as conditions precedent. In *Stokes v. Cox and Noel*, 38, E. S. & E. R., 437, which was an action on a fire insurance policy which stated that part of the lower story was used as a boiler house and added that no steam engine employed was on the premises, the 7th condition provided that if the risk should be increased by the erection of any stone, &c.; or by any other alteration of the premises, and the particulars were not endorsed on the policy by the secretary, and a higher premium paid, if required, the insurance should be of no force. Sometime after the granting of the policy the insured erected a steam engine on the premises and supplied it with a steam force to the boiler, but gave no notice of it to the insurance office. It was found by the jury, as a fact, that the risk was

not increased by the erection of the steam engine and the premises were destroyed by an accidental fire not attributable to the steam engine. It was held (reversing the judgment of the Court of Exchequer) that taking the whole policy together there was no implied warranty the premises should continue in the state they were described as being when the policy was effected; and that the alteration of the premises by the erection of the steam engine did not avail the policy, though no notice had been given to the office, as it had not increased the risk. Chief Justice Cockburn, in delivering judgment, states that "all the assured, in the present case, is called upon to do is, in case of an alteration increasing the risk, to give notice of the alteration to the insurance office." Here it is found, as a fact, that no increase of risk took place. It, therefore, was unnecessary for the assured to give such notice.

C. B. Pollock, in delivering judgment, states that "What is laid down in *Abbott on Shipping*, 221, appears to contain the pith and substance of this question: whether or not a particular condition, covenanted by what party, be a condition precedent, the breach of which will dispense with the performance of the contract by the other, or an independent covenant, is a question to be determined according to the fair intention of the parties, to be collected from the language employed by them. An intention to make any particular stipulation precedent should be clearly and unambiguously expressed" "The general rule, in the words of Lord Ellenborough, cited in *Davidson vs. Gwynne*, 12 East, 381, is that unless the non-performance alleged in breach of the contract goes to the whole right and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant for the breach of which the party may be compensated in damages." And Baron Bramwell, in the same case, says "It is always competent to the parties, if they think fit, to declare that any matter shall be a condition precedent, and an obligation on the other side; and if they do not do it themselves, in my judgment, those who have to construe instruments should be exceedingly chary of doing it for them."

Supposing next we view the effect of this 21st rule by a regard to the law of representations. As it is not contained in or referred to by the certificate, how will it stand? The first great distinction between an express warranty and a representation is that the former is always and the latter never written on the face of the policy; the second main distinction is, that

while a representation may be satisfied with a substantial and equitable compliance, a warranty requires a strict and liberal fulfilment—*1 Arnold, 581*. Every representation, however, even if inserted in a contract does not amount to a warranty—*2 Ad. on Con., 621*. Now, the object of the survey was to ascertain the condition and value of the vessel; on the trial she was not only proven by the plaintiffs, but admitted by the defendants, to have been seaworthy, and her value was not questioned. A survey could not reduce her admitted value, as stated in the certificate, and I do not see how its absence could alter the position of the parties, for “where non-compliance with the representation does not substantially alter the nature of the risk, it will produce no effect on the policy.”—*1 Arnold, 523*.

As to the point of waiver left to the jury as a separate and distinct question of fact, on which they gave their opinion in the affirmative, before they received their final direction from the Court to find a verdict for the plaintiffs, whereupon they gave a general verdict for them. I do not attach much importance to that point. The verdict does not rest upon it, and I shall, therefore, only notice it briefly. Looking at the rules as somewhat analogous in their bearing to representations, I may refer to *Bright vs. Fletcher, Doug. 284*, cited in *1 Arnold, 524*, where it is said “that if the underwriter subscribes a policy, the express terms of which are inconsistent with those of a representation made to him before doing so, this will operate as a waiver of his right to require a substantial compliance with the representation, or to insist on a failure in such compliance as avoiding the policy.” Lord Mansfield states, in the celebrated judgment in *Carter vs. Boehm, 3 Burt, 1409*, that “nothing need be disclosed to the underwriter which he himself waives being informed of.” Now, it did not seem to me an unreasonable proposition that, although the 21st rule stipulated for a notice from the assured when the vessel should come within reach of the surveyor, yet the certificate admitting that the vessel had been surveyed, operated as a waiver of the necessity for such a notice or a literal compliance with the provision. As to the contributions paid by the plaintiffs in respect of the *True Blue* to losses which happened before she was lost, but not paid until after the objections had been raised by the club to pay this loss on the ground of no survey, I think it was not unfairly urged that, as these contributions were the premium payable on the insurance of the *True Blue*, they

should not have been enforced, if, as the defendants contend, the policy had been forfeited for a previous non-compliance with a warranty, which would vitiate the insurance *ab initio*. A similar question was left to the jury in a case in *18 L. and E. R.*, 75, which was an action on a life policy containing a clause that the assured should not go out of Europe without notice of his intention being given to the underwriters and obtaining their assent. He went to Canada, and died there after several years. In the meantime no notice had been given, and no express assent obtained according to this condition of the policy; but the premium continued to be paid to the agent of the office by the assignee of the policy after the agent was aware of the assured having removed to Canada. It was held that the question of a waiver of a literal compliance with this condition had been properly left to the jury, who decided it in the affirmative. In *Blyth vs. Dennett*, *16 L. & E. R.*, 424, it was held that payment and acceptance of rent accruing after the expiration of a notice to quit amounts to a waiver of the notice, "and it is a question for the jury and not for the Court whether, under the circumstances of the case, the notice has been waived." Mr. Justice Creswell says that "the question was one altogether for the jury." Mr. Justice Williams says "I am of the same opinion; no question of the intention of parties can be a question of law." In *Armstrong vs. Turquand*, *9 I. C. L. Rep.*, 32, which was an action on a life policy containing a proviso that in case the assured had been guilty of fraud in procuring it, the policy should be void—it was held that the meaning of the proviso was that the policy should be void in the particular event, in case the company should elect to treat it so; and that inasmuch as the company had elected to treat it as subsisting, by the receipt of the premium, after they had knowledge of a fraudulent concealment of the assured having met with an accident, which would otherwise have avoided the policy, the company were held liable for the amount.

I am of opinion, upon the whole case, that the policy of the law, which binds parties to fulfil their contract according to the fair and common sense meaning of the language they have used to define their relative rights and duties, as illustrated by the various authorities to which I have referred, warrants me in coming to the conclusion to which I have arrived after much consideration, that there is no ground to disturb the verdict, and the rule ought to be discharged.

HON. SIR F. BRADY:

In this case I feel coerced to dissent from the opinions of my brother judges, after giving a most anxious consideration to the questions involved in it. I was not present at the trial; but I am as fully informed of all that transpired on that occasion as if I had been present, by the perusal of the notes of my brother judges. I find now from the judgments just delivered that we differ more widely than I supposed when I came into Court to-day, for both my brethren rest their opinions mainly on the ground that the certificate of the surveyors amounts in itself to a "policy" of insurance, while the case placed upon the record by the plaintiffs vests their right to recover both upon the rules of the association and upon the certificate, and by their declaration they state "and thereupon, in consideration that the plaintiff, at the request of the defendants, had become a member of the said association and had subscribed the rules thereof and had insured the said defendants in and upon divers ships and vessels of them the said defendants entered in the said association to a large amount, to wit, the sum of seven hundred and sixty pounds, for certain period in the said rules between them contained as a premium or reward for the insurance upon the said vessel *True Blue*, and had then promised the defendants to perform and fulfil the said rules on his part to be performed and fulfilled concerning the premises, the defendants then and there promised the plaintiff that they would become and be the insurers for the plaintiff upon the said ship *True Blue*, &c.

I will now, however, state the grounds upon which my opinion is decided. In this case the plaintiffs have brought their action against the defendants to recover from them their proportion of an insurance upon the vessel of the plaintiffs, the *True Blue*, made by the St. John's Mutual Marine Insurance Association. The claim is not founded upon any formal policy of insurance; such documents were not used, as it appears in this association, but in my judgment, in the words of Baron Alderson, in *Heath vs. Durant*, 12 Mees and W., 443, "It is an agreement in the nature of a policy, but proved by two pieces of paper," viz., in this case the rules of the association and the certificate of the surveyors. Upon a fair view of the pleadings and evidence, it appears to me that the following matters are admitted and undisputed in this case; first, I hold that the contract between the parties is comprised in the rules and the surveyor's certificate taken together; secondly, that at the time this contract was entered into the plaintiff's vessel was at an outport; thirdly,

that subsequently, in October, the vessel was in St. John's for some weeks, and that the plaintiffs during that time did not give the notice required by the 21st rule, and that she was not then surveyed; fourthly, that the vessel was never actually surveyed; fifthly, that it was the invariable usage in this association, as proved by Mr. Fraser and not contradicted, to give similar certificates to the one given in the present case, for vessels insured when they were in the outports; and sixthly, that the plaintiffs were fully aware of that usage, and were parties to its existence. It also appeared that, at least in the opinion of Mr. Muir, the giving such certificates did not in any way dispense with the obligation the owners were under of giving the notice required by the 21st rule, when such vessels came into St. John's, for he, in his evidence, admitted that she was not surveyed, and added that "he quite forgot to have her surveyed," thereby acknowledging that if he did recollect the obligation he would have performed it, while he now by his counsel contends that the certificate discharged that obligation. On this state of facts, the case of the plaintiff's is that the notice required by the 21st rule is not a warranty, the breach of which would vitiate the contract; and secondly, if it be so, that it has been waived by the acts of the defendants; while the defendants insist that the 21st rule embodies a warranty by the plaintiffs, on the breach, or on the non-performance, of which a forfeiture of the contract is the consequence. Upon this branch of the case I have merely to observe that the case was tried and sent to the jury, upon the ground that the right of the plaintiff to recover was forfeited, unless there was a waiver of the forfeiture by the defendants; for the only question left by the Court to the jury was as to whether there was a waiver of the forfeiture, and upon that alone the verdict in this case is founded. But independent of that, I apprehend a serious doubt cannot be entertained that the 21st rule does contain a warranty in law, and that the non-fulfilment of it entails a forfeiture unless it has been dispensed with or waived. The law upon this subject is thus laid down in all the authorities. "A warranty is a stipulation or agreement on the part of the insured, in the nature of a condition precedent. It may be either affirmative, as where the insured undertakes for the truth of the same positive allegation, as that the thing insured is neutral property, that the ship is of such a force, that she sailed or was well on such a day, &c.; or it may be promissory, as where the insured undertakes to perform some executory stipulation, as that

the ship shall sail on or before a given day; that she shall depart with convoy; that she shall be manned with such a complement of men," &c.—*3 Step N. P. 2119, and 1 Arnol. on Insurance, 577.* The warranty in the present case is of the latter class. "Such vessels are nevertheless to undergo a survey when within the reach of the surveyors of the association, of which the owner or agent shall give notice." Again, "A warranty being in the nature of a condition precedent, must be performed by the insured before he can demand performance of the contract on the part of the insurer; and it is quite immaterial for what purpose, or with what view, it is made; or whether the insured had any object in making it."—*Ibid.* The warranty being once inserted in the policy, it becomes a binding condition on the insured; and unless it has been strictly fulfilled, he can derive no benefit from the policy. The next meaning of the warranty is to preclude all question whether it has been substantially complied with or not. If it be affirmative, it must be literally true; if promissory, it must be strictly performed. "The breach of a warranty, therefore, consists either in the falsehood of an affirmative, or the non-performance of an executory stipulation. In either case the contract is void, *ab initio*, the warranty being a condition precedent; and whether the thing warranted was material, whether the breach of it proceeded from fraud, negligence, mis-information, or any other cause, the consequence is the same—*Ibid.* "It is also immaterial to what clause the non-compliance is attributable, for if it be not in fact complied with, though perhaps for best reason, the policy is void. The condition has not been performed, or the contingency has not happened, on which the contract was made; and the underwriter has a right to say that there is no contract. Therefore, if a ship be warranted to sail on or before a given day, and she be prevented by any accident, as the sudden want of repair, the appearance of an enemy, &c., from sailing till the next day, yet the warranty is not complied with, and there is an end of the policy.—*Ibid.* 2120. Upon these grounds I am clearly of opinion that the language of the 21st rule amounts to a warranty, and as the rules, in my opinion, form part of the contract of insurance, this warranty is expressed on the face of that contract.

But then it is said, admitting that to be so, the association by giving the certificate of survey waived the forfeiture that would otherwise have occurred from non-compliance with the warranty. This is really the important point in the case. It

is first said that granting the certificate of survey was a waiver of the forfeiture, to which an answer that cannot be controverted was given by Mr. Hoyles; viz. that the certificate was given months before the forfeiture occurred, and in my judgment it never therefore should have been entertained, either by the court or by the jury, as a waiver of the warranty by the plaintiffs, the breach of which did not occur until seven months after it was given. A waiver implies some act which prevents a party to a contract from relying upon the omission of the other party to do some act which its strict fulfilment required to be done under and by the contract; but the certificate in this case, being a portion of the original agreement or contract, could never be regarded as a waiver of the breach of the terms of that contract, which breach occurred months after the contract was completed. The only view in which this certificate could, in my humble opinion, have affected the decision of this case is, whether it did not operate at the inception and making of the contract, not certainly as a waiver, but as a dispensation altogether of the 21st rule and the warranty therein contained, a position not relied upon by the learned counsel for the plaintiffs, Mr. Carter, and for that reason perhaps not noticed by the court. No doubt the learned counsel for the plaintiffs felt little reliance upon that position, and conceived it more prudent instead of standing upon it, which if successful removed every ground of defence to his client's right to recover, to jumble the certificate up with other matters for the jury upon the question of waiver. But if this certificate were relied upon as a dispensation of the warranty at the inception of the contract, I will now consider how it would affect the merits of the case. The effect of the evidence of one of the plaintiffs is, that the certificate did not absolve him from the obligation to have the vessel surveyed when she came to St. John's, and that forgetfulness alone prevented him from having that done. The plaintiffs themselves are parties, as members of the association, to the granting of this certificate, and of similar certificates to all vessels registered in outports, and if the 21st rule is nugatory as to the plaintiffs, because they hold this certificate, it is also perfectly nugatory as to the owners of every other vessel in the club insured in an outport; and its existence in the rules, if that were so, would be as the association is now conducted utterly valueless. Learned gentlemen may for their clients contend that such was the understanding on which this association or co-partnership conducted their business, while in my

judgment the plaintiffs have admitted the very contrary; that it was, as Mr. Carter stated in his evidence, the invariable practice to grant the same certificate to vessels insured in the outports, and to vessels actually surveyed and insured here, and this was done in compliance with the 22nd rule, which required that all vessels should be valued, &c., and that in practice and usage, and course of business, it was never considered that such certificate dispensed with the obligation the owners had undertaken under the 21st rule. The plaintiffs understood the course and usage of the business of this body, of which they were members, as appears from the evidence of Mr. Muir to the trial; and this being the case, this usage in regard to the certificate was an important ingredient in this contract, by which the plaintiffs were bound; and it would be a violation of that part of the contract to permit them now to rely upon this certificate as dispensing with the warranty in the 21st rule, and thus given an effect to it wholly contrary to the true intent and real meaning of all the parties to this contract, both plaintiffs and defendants, all members of the body in which the usage prevailed, unless, indeed, there be some rule of law which coerces the Court to do so, and thus work an injustice upon the defendants. The 22nd rule prescribes that all vessels are to be valued by three competent surveyors; the 31st prescribes that the valuation, &c., is to be ascertained by an actual survey when the vessel is in St. John's; and the 21st prescribes, that the value is to be ascertained upon the best information the surveyors can obtain. The surveyors then have by invariable practice and usage adopted for both classes of vessels the same form of certificate, and that practice has been recognized and acted upon by the members of this body, including, of course, the plaintiffs, and under such circumstances, it appears to me that the law will apply each certificate in relation to the state of facts under which it was granted; and when it appears in evidence that the vessel was insured in St. John's, it will hold it to be a certificate under the 31st rule, and when insured in an outport, a certificate under the 21st rule. There are many authorities for this course of construing documents, and in Bythwood's Conveyancing, 375, T, Agreement, the rule is thus stated: "Besides resorting to parol evidence for the purpose of ascertaining the general meaning which the words of a written instrument bore among the class of persons by whom or under the circumstances in which it was made, parol evidence must be more or less relied upon for the purpose of applying the

words of the writing to the facts of the case." In Phillips on evidence, 738, this position is given: "If the instrument be written by a person of a particular class, or with reference to a particular subject-matter, parol evidence is admissible to show, that among that class of persons, or with reference to that subject-matter, a particular sense is by usage attached to the words different from the popular sense." Applying that doctrine to the present case, and bearing in mind, what never should be forgotten in considering this part of the case, that the plaintiffs and defendants are members of this Association, would it not be competent to shew by parol evidence, as was shewn in this case, that the certificate in this case was not a certificate of an actual survey under the 31st rule, but one founded upon information under the 21st? Again, in Addison on Contracts, 147, it is said: "To enable us to arrive at the real intention of the parties, and to make a correct application of the words and language of the contracts to the subject-matter thereof, and the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration;" and in case of great authority it has been said, "the law does not deny to the reader the same light and information which the writer enjoyed; he may acquaint himself with the persons and circumstances that are the subject of the allusions and statements in the written instrument, and is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he had viewed them, and so to judge of the meaning of the words and of the correct application of the language professed to be described.—*9 Cl. and Fin., 555, 569.* This language is taken from a decision in the House of Lords, and in construing the certificate in this case and the effect that should be given to it, I place myself in the situation of the plaintiffs, as members of this body. I know that this form of certificate is invariably granted by the surveyors, when they act under the 21st as well as the 31st rule; but that its effect and operation depend upon the class of vessels to which it was given; and when, as in this case, it is shown to have been given to a vessel insured in an outport it is subject to the warranty in the 21st rule.

There is another point of view in which this case should be considered, in reference to the language of the 21st and 22nd rules, and the practice and usage under them. The 22nd rule says: "All vessels taken in this Association shall be fairly and honestly valued by three competent surveyors," while the 21st

rule provides that for vessels in the outports "it shall and may be lawful for the committee to receive such vessels upon the best information they can obtain as to their condition and value;" and by invariable usage, as I have already stated, the same certificate has been given in both cases; although the one class is based upon an actual survey of the vessels, while the other rests upon mere evidence or information received by the surveyors. In the case of an outport vessel, therefore, the owner might have two certificates; first, one founded upon information, and, afterwards, by the vessel coming to St. John's; one based upon an actual survey, and therefore the moment you prove that the vessel was at an outport when insured, you raise upon the 22nd rule, which is on the face of it unambiguous, what is called a latent ambiguity, viz, whether the vessel's certificate be one on information, or one on actual survey, and to remove that ambiguity parol evidence is clearly admissible. "Where an ambiguity, not apparent on the face of a written instrument, is raised by the introduction of parol evidence, the same description of evidence is admitted to explain it. Thus, where a testator devises his estate of Blackacre and has two estates called Blackacre, evidence may be admitted to show which of the Blackacres is meant; or if one devises to his son, John Thomas, and he has two sons of the name of John Thomas, evidence may be admitted to show which of them the testator intended, (*per Gibbs, C. J., in Doe v. Chichester, 4 Dow, 93; Doe d. Morgan v. Morgan, 1 C. & M., 235*) because parol evidence when so admitted does not vary or contradict the written instrument, but determines merely to what set of facts it applies."—*2 Steph., N. P., 1858*. Apply the ruling in these authorities to the evidence given in the present case to show to which of the two classes of certificates the one we are considering belongs, and it will be difficult to point out a distinction between these authorities and this case.

I am of opinion, therefore, upon these grounds, that the parol evidence was properly received, not to contradict the certificate, but to explain to which class of certificates it belonged, and to establish, as the evidence did, that it did not prove an actual survey of the vessel, but one had upon information under the 21st rule, and that the owners were, therefore, subject to the warranty contained in that rule. If I am correct in either of the views I have expressed upon this part of the case, as all the circumstances I rely on appeared on the case of the plaintiffs, the defendants would be entitled to a non-suit. The

second branch of the defendant's rule is for a new trial on the ground of mis-direction, upon the question of waiver; in fact the only question left to the jury, and the verdict in this case is altogether based upon the finding of the jury, is upon this issue. The questions left by my brother, Judge Little, in his charge to the jury, were in the following words which I quote from the only report of the charge to which I have been referred. The plaintiff relies upon three grounds, 1st, he says he received his certificate and paid his contributions, which were a waiver by the defendants of any obligation cast upon him; 2nd, that the Association having endeavored to save the vessel, virtually acknowledge their liability, and shows that they did not contemplate to insist upon a strict compliance of the rules. The first issue the jury had to determine was whether there was honestly and bona fide a waiver by the defendants of the rules of the Club. If they found there was not, they would receive further instructions from the Court. If they found there was a waiver they would find for the plaintiff. Mr. Hoyles's objection to this direction is "that there was no evidence of a waiver, and that waiver was a question for the Court and not for the jury." This was a subject upon which I had recently so pronounced a judgment in another case in which I had, before doing so, to examine all the authorities, and I apprehend there cannot be a doubt that it is the duty of the Court to direct the jury as to the evidence relied on to prove a waiver, whether it would or would not, if believed, amount to a defence on that ground; and that it is then the duty of the jury to say how far they are satisfied or otherwise with the evidence offered in support of the waiver. The case to which I have referred was the *St. John's Savings' Bank v. P. McPherson*, and in my judgment I cited several authorities to show that where parties rely upon circumstances that they say dispenses with the performance of what amounts to a condition precedent "must be specially alleged in the declaration," and "that proof of those facts is inadequate to the support of a positive averment" in the declaration of, in this case, performance of the warranty; and also as to what would or what would not amount, in point of law, to a waiver of such a condition. In this case three matters, viz., the certificate, the payment of contributions to other losses, and the circumstances which took place when the vessel was in distress are submitted to the jury, and it is left to them to say whether, upon consideration of them, the defendants waived the breach of

warranty, and they find that they did. The jury were not told by his lordship that all these together, or any one of them, if proved to the satisfaction of the jury, would, in point of law, be a waiver of the breach of warranty; but that, which is matter of law, was left wholly to the jury. If the Court told the jury that the defendants, by giving the certificate, had done what amounted to a waiver in point of law, that direction would have been open to an exception which, in my judgment, would prove successful, upon the grounds I have already stated in reference to that document. Again, as to the second ground of waiver, that the plaintiffs had contributed, prior to and since the loss of their vessel, to other risks in the Association, whether such contributions amounted to a waiver, or to any evidence of a waiver depended upon this question, were the plaintiffs or were they not, in point of law, bound to make these payments, without any regard whatever to this case? and if upon this question of pure law, the Court had given a direction to the jury, one way or the other, it would be also open to an exception by the party affected by such direction, but that was not done; but this most important, and let me add, most difficult legal question is, contrary in my judgment, to all rule, left wholly to the decision of the jury. As to the third ground, as to what took place when the vessel was in distress, I will content myself by saying that I do not think it contains one ingredient from which a waiver of a legal right could be established.

Upon all these grounds I am of opinion that the right in this case was with the defendants, and also that there was a misdirection in the charge, and that the objection to it is a sound and valid one and ought to be allowed.

Mr. Carter, Q. C., and Mr. Little for plaintiff.

Mr. Hoyles, Q. C., for defendant.

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1860, *January*. BY THE COURT.

Shipping—Merchant's Shipping Act—Registration—Trusts.

The provisions of the Merchants' Shipping Act do not take away the power of the Court to notice trusts, and in this respect only applies to registry.

By the bill of complaint it appeared that the complainant was the registered owner of a vessel called the *Contest*; that by deed of sale dated 5th January, 1859, he sold the said vessel to the defendant, Duncan Cameron, in trust, to sell and dispose of the same and pay one-half the proceeds to the defendant, William James, and the other half to the use of the complainant; the defendant Cameron had since denied complainant's right or interest in said vessel, and that he was entitled to hold her discharged from the said trust, that he would sell her and appropriate the money to his own use. Complainant further stated that Cameron had endeavoured to sell the vessel.

That besides the agreement of trust between Cameron and the complainant, Cameron had in recognition and acknowledgment of said trust, by his last will and testament declared the said vessel to be the property of complainant and the said Wm. James.

Extract from will:—"The brig *Contest*, now in Saint John's aforesaid, is the property of William James, of Liverpool, England, or his assignees, and of the said Denis O'Meara Reddin, according to such interest as they the said William James and Denis O'Meara Reddin, have agreed on; and her net proceeds, subject to any advances I may obtain on her for outfit and so forth, is to be paid over to them, the said William James or his assignees and Denis O'Meara Reddin—the said Edward Palmer being at present the agent for the said William James or his assignees."

It was further stated that Cameron had refused to assign said vessel to a person to be appointed by complainant and William James to be sold according to the said trust, asserting that the said vessel was his absolute property; that shortly after the execution, by Cameron, of the trust deed, the complainant took from him a promissory note for three hundred pounds, expressed to be in full for complainant's interest in said vessel, but which note was afterwards destroyed and cancelled by Cameron with complainant's assent; that Cameron held complainant's receipt for the note and refused to deliver it up; that subse-

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quently to the cancelling of the note, Cameron, in recognition of the trust, gave complainant a promissory note, not negotiable, expressed to pay him or order three hundred pounds out of the proceeds of the *Contest*, to be used in arranging with a creditor of complainant. The note was in complainant's hands, not having been used.

Cameron contended that the note first given and afterwards cancelled, gave him the absolute property in said vessel, freed from the equity of the complainant.

That the said Daniel Jackson Roberts asserting that he was the owner of the said vessel, that the register was wrongfully obtained, had filed his petition in the Supreme Court against complainant and the said William James, Duncan Cameron, Edward Palmer, to compel the reformation of the certificate, and that he, Roberts, be declared the owner, and that Cameron be restrained by injunction from interfering with said vessel, which injunction was granted 13th September, 1859. That suit still pending, no answers filed.

The complainant, Denis O'Meara Reddin, prayed that the vessel be decreed to be held by Cameron in trust, and that a transfer of her be made to some person the Court might appoint, or that the vessel might be sold under the direction of the Court, and the proceeds applied according to the agreement, and the terms of the said declaration of trust.

Mr. Pinsent moved for final decree.

Mr. Hoyles and Mr. Carter on behalf of Daniel J. Roberts and William James assenting, the Attorney General on behalf of Duncan Cameron asked leave to postpone the hearing to enable him to move to set aside the proceedings.

Mr. Pinsent contended that the defendant was not entitled to any indulgence in the case; that the bill was filed 30th January, 1860, and taken "pro confesso" the 25th February following, of all which proceedings the defendant had notice.

The Court refused to hear such a motion the bill being taken as confessed in February last, and no step since taken by the defendant.

The Attorney General then contended that under the Merchant's Shipping Act, no trust could be taken notice of; that the ship had become the absolute property of the defendant.

Mr. Pinsent replied.

The Court held that the provisions of that Act only applied to the registry, and did not prevent the Court from taking

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notice of trusts, as between original parties, and cited 18, C. L. and E. R.

Decree ordered according to prayer of bill, subject to a motion on the merits within a week.

Mr. Pinsent for complainant.

Attorney General for defendant Cameron.

Mr. Hoyles for Roberts.

Mr. Carter for James.

THOMPSON AND ABBOTT v. NUGENT, SHERIFF.

1860, January. BY THE COURT.

Sheriff—Attachment—Attaching a British ship—Interest of mortgagor in ship after he has mortgaged same—Practice—Non-suit.

The British ship *Islay* was, previous to April 13th, 1857, owned by one Lydrail, and on that date mortgaged by him to one Young, of P. E. I. Some time after Young assigned the mortgage to the plaintiffs. In the autumn of 1858 the *Islay* came to St. John's, Newfoundland, where she was attached at the suit of the seamen against the mortgagor for their wages, under which attachment the sheriff seized and kept possession of the ship; this was before notice to the sheriff that plaintiffs had any interest in her. Afterwards notice was given to the sheriff by the plaintiffs of their interest, when the latter offered to give up the vessel, which was declined, and the ship, being abandoned, went adrift and was lost. In an action of trover against the sheriff, the jury found for the plaintiffs. On a rule nisi to set aside the verdict and enter a non-suit—

Held—(Setting aside the verdict)—The sheriff was not a wrong-doer, and was justified in attaching the ship. The whole of Lydrail's interest did not pass to the mortgagee, and Lydrail's creditors could attach the ship to the extent of that interest. The mortgagee does not become, nor does the mortgagor cease to be, the owner of the vessel. A British ship forms the exception to the rule that the whole legal estate or interest in all property mortgaged vests in the mortgagee.

THIS is an action brought by plaintiffs against John Valentine Nugent, Sheriff of the Central District, for interfering and intermeddling with property which he had no right or authority to do. It appeared that a vessel called the *Islay* arrived at St. John's from P. E. Island in the fall of 1858, consigned to Clift, Wood & Co.; that there were some parties who had a claim against her, and who issued a writ of attachment, and under that writ the sheriff served and took possession of her;

she then proceeded to strip her sails and materials and sold them; and ultimately the vessel, from want of ordinary care on the part of defendant, drifted out of the narrows and has never since being heard of. It seems that the vessel was registered in the name of one Lydraid, but that the real owners were plaintiffs. The usual notices were given to the sheriff, so that he was aware how matters stood, but he treated all such notices with defiance. The sheriff acted upon his own responsibility.

(There was a great deal of documentary and other evidence in this case).

The case for the plaintiff having closed, the Attorney General moved for a non-suit on the following grounds: That there was no right or title proven in plaintiffs; that there was shewn no possession or right of possession in plaintiffs; that the statute prescribes a certain form of mortgage which has not been carried out in this case; and that the assignment executed was not according to law.

The Court reserved these points, and asked the Attorney General if there was any question to go to the jury, to which he replied, yes, viz., whether the vessel was or was not abandoned.

The Chief Justice: If plaintiffs under the attachment were not the legal owners of the vessel, the defendant had no right to deal with her.

(The Attorney General addresses the jury).

The defence set up was, that the vessel was abandoned and that she was not safe or seaworthy; that on the 11th Dec., 1858, the sails of said vessel were sold under an order from the Chief Justice, long before plaintiffs took any active steps in the matter; that every possible care was taken of that vessel while in the defendant's possession; that on the 21st December the sheriff sent to Mr. Carter to say that he had nothing more to do with the vessel, and he said, "Very well"; that the vessel was sent adrift by a servant of Clift, Wood & Co.; and that she was lost by the neglect of the agent or the agent of the assignee.

[Here follows the evidence for the defence, which was very lengthy].

The case was here adjourned until the following day, June 1st, when the Chief Justice charged the jury:

In this case the plaintiffs have brought an action of trover against the defendant, and in that action they seek to recover

the sum of £300 from defendant, on the ground that he seized and took possession of property of that value which did not belong to the defendant under the attachment, and which he was not justified in doing.

The broad claim of plaintiffs is, that the sheriff is not authorized to seize on the property of A B under an execution or writ against C D. It appears from the evidence that in 1857 one Lydraid was owner of the vessel, and that in October of the same year a mortgage was given by Lydraid to Young, of P. E. Island, and that Young assigned the vessel to plaintiffs; and in that statement of the case the property was vested in the present plaintiffs, and no writ of the sheriff against Lydraid could affect them. The first branch of plaintiffs' claim has relation to the sails and rigging, which were taken and sold by the sheriff, and which in point of law I am bound to tell you was a wrongful act on the part of the sheriff, and for which he is responsible; it appeared further that other property belonging to her was sold of the value of £33, making altogether the sum of £63, for which the defendant is liable, and to which extent the sheriff has made no defence. Mr. Hoyles has stated that these articles were considerably sacrificed, but as you have no other evidence of their value, you will, therefore, feel perhaps that you ought not to go beyond that amount. The second branch of this case is the question relating to the hull of the vessel, and I have no hesitation in saying that when the sheriff seized the *Islay* in September, and held possession of her until 21st March, and in the meantime strips and dismantles her which he was not justified in doing, the present plaintiffs would not be bound to accept her. But, gentlemen, do you believe Mr. Carter repudiated the offer of the vessel made by the sheriff on the 21st of March, or did he accept her in part discharge for the debt of the plaintiffs? This will altogether depend on the evidence of Mr. Carter, on the one side, and that of Mr. Jeans, on the other. The evidence respecting the value of the ship, viz, £300, seems to be exaggerated and there is very great contradiction on this point.

[Here His Lordship read the evidence of Mr. Carter and Mr. Jeans].

This is the whole case; the plaintiffs have established an undoubted right to recover the gross amount of materials sold by the sheriff, and if you should believe Mr. Carter did accept the hull in part discharge, the damages ought to be reduced. If you believe he repudiated the vessel defendant is bound to

answer for the hull as well as for the material. The question for you to consider will be what amount of damages the plaintiffs have sustained and find accordingly.

Verdict for plaintiffs, £100 currency.

On a subsequent day a rule nisi was obtained to set aside the verdict and enter a non-suit, when after hearing the parties the following judgment was delivered:—

The Chief Justice delivered the judgment of the court.

This was an action of trover brought to recover from the defendant the value of the ship *Islay*, which the plaintiffs alleged he had unlawfully taken and deprived them of. It appeared in evidence that E. L. Lydiard was the owner of this vessel, and that on the 13th April, 1857, he mortgaged her to Charles Young, of Prince Edward Island, in consideration of the sum of £300, payable on the 13th April, 1858, and that Young assigned his mortgage to the plaintiffs. It further appeared that in the fall of 1858, the *Islay* came to this port, and that attachments were issued and placed in the sheriff's hands at the suit of the seamen against the mortgagor (Lydiard) for their wages, and under which attachments the sheriff seized and kept possession of her. These attachments issued, the first on the 11th of September, and the others in October and subsequent months, and the sheriff made his several returns upon them, stating that he had attached the *Islay* and her materials. October 9th orders for sale of portions of the materials of the *Islay* were made by the court in these causes. All these proceedings were prior to any notice of any kind whatever to the sheriff that the plaintiffs had the slightest interest in the vessel. Subsequently notice of the title of the plaintiffs was given to the sheriff, who after some parley offered to give up the vessel to their agent, but the latter declined to accept her in her then dismantled condition, and all parties having left her in the harbor to her fate, she drifted out of the narrows and has not since been heard of. The plaintiff having made the usual demand, brought the present action in November, 1859, and obtained a verdict for £100, subject to leave reserved to have a non-suit entered in case we should be of opinion that the action was not maintainable. It will be conceded that if the vessel continued to be the property of Lydiard, the sheriff would not only be justified in attaching the vessel and her materials, but that he would be bound to do so under the process of the court. The plaintiffs, however, contend that by the

execution of the mortgage he transferred to the mortgagee all the property in the vessel and her materials, and that these are now vested in them as assignees of the mortgage, and that the sheriff was a wrong-doer in attaching their property for the debts of Lydiard. This position would be unanswerable if it were true that all Lydiard's interest in the vessel passed to the mortgagee; but if that were otherwise it would equally follow that Lydiard's creditors could attach her, at least to the extent of that interest, and the sheriff would be justified in taking her under such attachment; and assuming that the title of the plaintiffs under the mortgage has been regularly proved, the single question in the case is whether there remained in Lydiard, after the execution of the mortgage, an interest which his creditors could attach?

By the express words of the several statutes relating to shipping, the mortgagee does not become, nor does the mortgagor cease to be, the owner of the vessel. The law is thus stated in *Williams on P. Property*, 55, "under the statute the transferor is not deemed to have ceased to be the owner, any more than if no such transfer had been made, except so far as may be necessary for rendering the ship available for the payment of the mortgage debt. A British ship, therefore, forms an exception to the rule that the whole legal estate or interest in all property mortgaged vests in the mortgagee. The mortgagor still retains a legal interest, which he may assign subject to the mortgage"; and in *Sn. Mer, Law*, 180, it is said: "As the entire property does not pass to the mortgagee, there of course remains a portion in the mortgagor, which he can transfer to a second purchaser or mortgagee." Upon these authorities we think it plain that Lydiard had a legal interest in this vessel notwithstanding the mortgage: that the portion of property which remained in him after execution of the mortgage, and which Smith says he might assign, was also subject to the attachment of this court at the suit of Lydiard's creditors; and that in attaching and keeping possession of this property, and in other acts in reference to it, he (the sheriff) was not a wrong-doer, but was merely in due course of law carrying out the mandate of this court, and while he so held possession of the vessel the plaintiffs could not treat him as a wrong-doer and maintain this action against him. Let the verdict be set aside, and a non-suit entered.

Mr. Carter, Q.C., and Mr. Hoyles, Q.C., for plaintiffs.

The Attorney General for defendant.

1860, *January*. HON. SIR F. BRADY, C. J.

Contract—Breach—Damages—Remoteness of damage—Liability of surety.

In an action brought against the defendants as sureties for damages by reason of the failure in the performance of certain repairs to a vessel, an item in the claim represented the loss of seals, which it was claimed the vessel might have secured had she been finished in time to permit of her prosecuting the sealing voyage.

Held—The damages were too remote, and, being entirely of a speculative character, could not be entertained.

THE plaintiff's notice of action set forth as follows:—

"This action is brought by the plaintiff against the defendants to recover damages for loss sustained by plaintiff from breach of following agreement, the defendants being, as in manner hereinafter set forth, securities for the due fulfilment of the agreement by Albert Pittman, party thereto."

Here the plaintiff set out the agreement, of which the following is a copy:—

"CARBONEAR, Oct. 11th, 1859.

"It is this day agreed between the undersigned, Albert Pittman and John Rorke, that the said Albert Pittman do take from hence to New Perlican, in Trinity Bay, the schooner *Mary*, and there haul her up and repair her, agreeable to specification hereafter particularized. Said repairs to be finished and completed in a workmanlike manner, and the vessel to be launched ready for delivery to the said John Rorke on or before the thirteenth day of February next, and he, the said John Rorke, in consideration of said work and repairs being done to said vessel, shall pay to the said Albert Pittman the sum of seven hundred and ten pounds currency, and, in addition, shall furnish him with bolt iron, nails, pitch and oakum, in sufficient quantity to complete said repairs; and also, shall find rudder, iron work, channel plate, backstay irons and deck ring bolts; all other iron work to be found at the expense of the said contractor, Albert Pittman, who hereby engages at the time of signature hereof, to give good sufficient security for the due fulfilment of this agreement in all respects.

"Particulars of work and repairs to be done on schooner *Mary*: Her present length is 69 3-10th feet—she is to be lengthened fore and aft 12 feet in the whole. Her present breadth is 17 2-10th feet—she is to be widened 1 foot amidships, and fore and aft in same proportion. She is 10 2-10th

feet deep now, and is to be deepened to make her equal to 11 feet from ceiling. She is to be torn down to floor heads, and the fore and aft timber work to be entirely taken away; if any of her second futtocks shall prove sound, they may remain in her, at the option of her owner (the said John Rorke), on inspection, and a new keelson. All other timber and woodwork to be entirely new, and of good sufficient scantling for a sealing vessel of her size: wichhazel and juniper. She is to be planked with 3-inch birch and wichhazel plank, of good length—her wales to be 4-inch thick: topsides usual or proportionate thickness; plank shears not less than 3-inch thick; to be decked with 3-inch pine decking of good length, and ceiled with 2½-inch spruce and hardwood plank: two sets stringers inside, one over floor; futtock ends, 4-inch thick, and the other where false beams will meet; fore and aft bulk head to be finished with 2-inch plank; forecastle, cabin to be finished in a plain and commodious style; bulwarks, rails, companion hatches, and all other necessary work belonging and about the deck in wood and iron, to be done, and a new foretop to be made, and the woodwork of caps, if found necessary. Also, two new rudders and tillers, with any other unparticularized job properly belonging to the hull of said vessel; the said owner, John Rorke, is to find spars, chains, anchors, sails and rigging, together with such items as are hereinbefore specified, at his own expense and charges, and also iron sheathing. Payment of contract to be made as follows, viz.:

“One hundred pounds in advance when called for, by note at three months, such goods and provisions as may be required during the repairs, to the extent of a sum not exceeding two hundred pounds, and the remainder by note at three months from date of completion of contract.

“As witness our hands.


“ALBERT PITTMAN.

“JOHN RORKE.

“Witness: GEORGE RORKE

“Securities:

“JOHN MADDOCK.

“CHARLES MOORS,  my
mark.

“ROBERT CALLAHAN,  my
mark.

“Witness to securities: GEORGE RORKE.”

After having set out the said agreement, the plaintiff, in his notice of action, averred the performance of his portion of the agreement, and of his loss sustained by non-performance by Albert Pittman, in the following terms:

"And plaintiff says that he performed all his portion of the agreement in its integrity, but that the said ship was not finished and completed in a workmanlike manner, but that the work was so badly done that he has suffered a loss thereby of £300, nor was the said ship launched and ready for delivery on or before the 13th day of February, A. D. 1860, whereby he lost the use and profits of the said ship, and of her voyage at the seal fishery, amounting to £100; also, a loss of £50 on account of supplies sent to New Perlican for said vessel's outfit to seal fishery, and expense incurred in so doing; and a further loss of £10 by reason of Albert Pittman's having failed to do his work, so that plaintiff had to employ different parties and incur extra expense in rigging said vessel; all which said damage which plaintiff has sustained amounts, in the whole, to £460, therefore he brings suit."

Plaintiff's counsel addressed the jury, and called George Rorke (who proved the agreement), the plaintiff, and six other witnesses, and closed the case.

Hon. G. H. Emerson, Q. C., then moved for a non-suit on the following grounds:

1st. Insufficiency of contract. There was no privity of contract between the plaintiff and defendants; the defendants' names did not appear in the body of the agreement.

The Statute of Frauds required a certain note or memorandum to bind the defendants to the plaintiff as guarantors, and such memorandum should be sufficient to charge the parties bound.

2nd. Non-performance by plaintiff of his portion of agreement in all its totality and integrity—*Chitty on Contracts*, 529; *Hawkshaw vs. Perkins*, 2, *Swanst.*, 539. Any alteration, however *bona fide*, by the creditor and principal, of the terms of the original agreement, in reference to which the surety became responsible for the principal, will clearly exonerate the surety, not having notice of and assenting thereto, from all liability.

3rd. The guarantee should point to a consideration for it—*4 sec. Stat. Frauds*; *Hawes et al vs. Armstrong*, 1 *Bingham's N. C.*, 571. There was none shewn here. Also, the defendants had signed the day after the plaintiff and Pittman—*Steed vs. Sudyer*, 187.

The Court reserved the points.

Mr. Emerson then addressed the jury, but did not call any witnesses.

His Lordship then charged the jury and said :

That this was an action brought by the plaintiff, John Rorke, against the defendants, as alleged securities for the true and faithful performance of the repair of a certain vessel of the plaintiffs, called the *Mary*, by Albert Pittman. The plaintiff avers that the said Pittman did not perform his contract, whereby he, the plaintiff has suffered loss to the extent of £460; and he, therefore, looks to the defendants as securities for the due performance of the written agreement entered into by the said Albert Pittman with him, which has been produced and proved here to-day. The only questions in this case for the jury were, whether Rorke, having performed his part of the agreement with Albert Pittman, and not having prevented or delayed him in going on with his work, Pittman had failed in his contract, and whether plaintiff had suffered damage and loss by reason of Albert Pittman having failed to perform his agreement with him. If the jury should find in the affirmative, their verdict would then be for the plaintiff. Upon the other hand, if Pittman had fulfilled his contract, or had been prevented or delayed by Rorke from performing his agreement, then their verdict should be for defendant. The character of the plaintiff's witnesses had not been impugned, and their evidence was uncontradicted, and the jury should apply that evidence to the case before them. Mr. Rorke says he would not have entered into that agreement without sufficient security. It did not appear that Pittman was delayed by non-advance of the proper materials which Mr. Rorke was bound to supply. It was contended that Pittman was obstructed in doing his work by Mr. Rorke giving him too large supplies, but the jury would consider whether it was not more than likely that Pittman and his crew would have left off working if Pittman was not supplied by Rorke with the necessary materials, &c., and provisions he had taken up.

The time within which the repair of the vessel was to be completed, that is, before the 13th February, 1860, was a matter for their attention. As to the alleged damages sustained by the plaintiff—losing seals on the last seal fishery voyage by reason of such breach of the contract, as he says, His Lordship said that damages founded upon any supposed loss which

the plaintiff might have suffered thereby, were entirely speculative, and he should advise them not to take such a matter into their consideration. Had the vessel been finished in a strong, substantial manner? Had she been honestly rebuilt? Was she what she ought to be under the terms of the contract? And was she completed by the time agreed on? If so, then their verdict ought to be for the defendants. He should here state that, according to the evidence of plaintiff, Mr. Bemister, Mr. Udle, Mr. William Taylor, Mr. Pike and Mr. Nichole, that the vessel's timbers were small, her bulk-heads insufficient, her fastenings of iron insufficient. Mr. Rorke says he verily believes that the vessel is of less value than £600; but there were circumstances which bore against that idea—for the vessel had been insured for £1,100, and had been sold for £1,200, though not yet paid for. Notwithstanding the position, as sureties, of the defendants, the jury should not lose sight of the position of the plaintiff, because it did not consist with justice that a man should not obtain damages if he had suffered any; because the defendants were only sureties, they had voluntarily become such, and induced the plaintiff to employ Pittman. The plaintiff had sworn that the vessel might, if she had been properly repaired, have been sold for £1,600. The jury should exclude from their minds the position of the defendants as guarantors. They should look fairly at the whole case, and if they found that the plaintiff had, without any default of his own, suffered loss by the non-performance of the agreement by Pittman, then their verdict ought to be for the plaintiff, and the damages which they might give should be consistent with the breach of contract and agreeable to the evidence. The jury retired at 7 p. m.

The jury came into Court at 8.40 p. m., with a verdict for plaintiff, one shilling damages. Plaintiff's counsel moved for rule to set aside verdict and for new trial, on grounds of verdict being contrary to evidence, and that the damages were altogether too small according to the evidence and His Lordship's charge.

Solicitor General, for defendants, opposed, and moved for rule for non-suit on the points reserved on the trial.

The Court, considering the whole evidence, felt constrained to refuse Mr. Emerson's motion for new trial, although His Lordship said if he had been on the jury he might have given larger damages. That was, however, a question for their determination; but he concurred with the Solicitor General's

motion for rule for non-suit, and granted same, to be argued in the Supreme Court.

Mr. A. Emerson for plaintiff.

Solicitor General and *Hon G. H. Emerson* for defendants.

DONALD v. CANDLER.

1860, *January*. HON. SIR F. BRADY, C. J.

Master and servant—Fishery servant—Action for wages, defence, desertion—Wages to which servant is entitled where he accepts his clearance.

Where a fishery servant is forced to leave his employment by the harsh treatment of his master, or by his life being endangered by the service, he is not alone justified in leaving the service, but is entitled to the whole of his wages.

A servant seeking and accepting his clearance is only entitled to wages up to the time of leaving his master's service.

THE plaintiff sought to recover from the defendant £20 wages, as fishery servant to the defendant at the Labrador during the past summer. The defendant pleaded desertion of his service by the plaintiff. The plaintiff replied that he was compelled to leave the service of the defendant, owing to harsh and wanton ill-treatment of him by the defendant's son, Arthur Candler, and that defendant had discharged plaintiff. It appeared from the examination of the plaintiff, that he had shipped to defendant as his servant, and had gone to the Labrador with him on the 20th June—that said Arthur Candler was there, that he managed the business most of the time. About 12th August, Arthur Candler followed plaintiff into a strange house, (of one Murphy), with a jug of rum in his hand, and wanted plaintiff to drink, but he would not. He threatened to drive his knife into plaintiff; had complained of him several times to his father. He threatened plaintiff's life in the fore-castle of the vessel. Plaintiff had complained next day to his father; his father said he could not do anything. Plaintiff was standing on the deck of the vessel with William Hickey, another servant of defendant's, before daylight on the morning of 22nd August. Defendant and his said son Arthur were there also. The son said to his father—"give them fellows their clearance off this room," and defendant said he would as soon as it was daylight and the

cabin righted. Plaintiff went down into defendant's cabin. Defendant said to plaintiff—"You can be off about your business; I don't want you." Plaintiff then left the service. Wm. Hickey and Mary Walsh were called in support of plaintiff's case; after whose examination it closed.

Solicitor General addressed the Court for defendant, and called Thomas Candler, (defendant), who denied that he had discharged the plaintiff from his service; that Arthur Candler, his son, had no authority in the business; that he had spoken to Arthur about it, and chastised him for his ill-treatment of the plaintiff; but it was of no avail. When plaintiff had asked him, defendant, for his clearance, he, defendant, had said "oh certainly—to be sure," but he (defendant) said that was out of derision of his (plaintiff's) conduct. Defendant had told him to go off to his work; never gave him any clearance whatever. This was about 22nd August.

Defendant's counsel then called Alfred Hopkins and Elias Warren as witnesses, and put in set-off £2 2s. cy., and defendant's case here closed.

Hon. G. H. Emerson then addressed the Court.

His Lordship pronounced judgment and said:—

That this was an action for the recovery of the sum of £20, which the plaintiff said was due to him by the defendant for wages as his servant at the fishery at Labrador during the past summer. It was alleged that defendant's son, Arthur Candler, acted as mate or manager for defendant, and that the plaintiff had been compelled by the violent conduct of this young man, to quit the defendant's vessel and service; said Arthur Candler being repeatedly drunk, and in the habit of drawing his knife on plaintiff, and otherwise threatening him. His lordship lamented that this use of the knife was a practice which had become too common of late. One man was now expiating an offence for having drawn his knife upon another man; and a true bill for a like offence had been found against another. There was evidence, which was not contradicted, that young Candler was of violent, drunken habits; and that evidence was to a certain extent confirmed by the father. It was also in evidence that defendant was constantly drunk; but he had been enabled to call witnesses to contradict plaintiff's witness (Mary Walsh), in her statement that he, defendant, was of drunken habits. The evidence of defendant and his witnesses had gone a long way to contradict such an assertion, although the witnesses for the plaintiff concurred in stating that such

were the drunken habits of defendant, that the vessel was turned into a place of constant noise and quarrelling. It was satisfactory for Mr. Candler to have this evidence contradicted. If the Court should think that the plaintiff could not stay in the defendant's vessel, and in his service, on account of harsh treatment, and his life being in danger, and that plaintiff did leave on that account, the Court would give him the whole of his wages; but if plaintiff sought his clearance, and consented to terminate his contract, then he would only be entitled up to the time he left. Now plaintiff says he went to Candler, the defendant, and asked for his clearance, and that defendant said he would give it to him when it was daylight. Defendant did not deny this. He had told plaintiff—"go about your work" or "business," he, defendant, did not recollect which. That expression was open to two meanings. The defendant admitted that he said—"To be sure you must have your clearance," but now says that he was speaking ironically. If Mr. Candler thought fit to use equivocal language he should bear the consequences of it. His lordship, on the whole evidence, considered that Candler had given the plaintiff his clearance. Whilst plaintiff was not entitled to full wages, because he sought and accepted his clearance. His lordship thought that he was entitled to be paid up to the time he left, and gave judgment for the plaintiff—£8 12s. 6d., which judgment was based upon the fact of the plaintiff having left defendant's service on 22nd August, allowing also the set-off £2 2s. 6d.

Hon. G. H. Emerson, Q. C., for plaintiff.

Solicitor General for defendant.

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BOUTIN.

1860, January. BRADY, C. J.; LITTLE, J.; ROBINSON, J.

Insolvency—19 Vic., cap. 14—Wages of fishery servant—How far formal declaration of insolvency of employer is necessary to establish lien of servants for wages.

In order for fishery servants to successfully maintain their lien for wages under 19 Vic., cap. 14, it is not necessary for the employer to be formally declared insolvent.

Mr. Whiteway, counsel for B. Wier & Co., creditors of Alex. Boutin, answered a rule nisi obtained by the hon. the Attorney General, to show cause why the following amounts should not be paid out of the proceeds by the above estate, viz., Thomas McKue, sr., £40; Thomas McKue, jr., £12; and Peter Fitzgerald, £140. It appears that certain property consisting of fish, a boat, &c., had been attached at the suits of McKue and Fitzgerald against Boutin, and by the order of the Court sold, and the proceeds paid in to abide the further order of the Court. That on the 20th September, 1858, prior to the attachment, Boutin had mortgaged the above together with other property to Wier & Co., to secure the payment of a large sum of money. Boutin remained in possession for short time after the mortgage, and then Wakely, who had been Boutin's clerk, took possession as Wier & Co's agent under their instructions. Boutin was declared insolvent in June, 1859, and the Clerk of the Court was appointed trustee of his estate. In support of the rule were produced the affidavit of Fitzgerald, and the examination of McKue, senior and junior, setting forth that the property attached was, while Boutin was in possession, delivered by him to the several parties in payment of their claims; also the master's report that the two McKue's and Fitzgerald were servants employed in the fishery at the respective wages, viz., Peter Fitzgerald, £37; Thomas McKue, £39; and Thomas McKue, jr., £12; and that the amounts mentioned in the rule were respectively due to them. Mr. Whiteway, in showing cause, produced the mortgage deed of Boutin to Weir, also affidavits of Wylde and Wakely, setting forth that the property attached was part of the property conveyed to Weir and Co., taken possession of by their agent, and so remained until the attachments, and contended that all the funds in Court belonged to Weir & Co., as the proceeds of part of the property mortgaged to them, and were so reported by the master, and argued from the several affidavits that there never was

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any legal transfer to Fitzgerald or the McKues; that Boutin had no authority to transfer, even if he had such authority, there was nothing in the affidavits to show that a transfer and delivery had been made; they had never exercised any right of ownership, the property had remained all the time on Boutin's premises, and also submitted that the Court had not authority to determine the right to the property in this summary proceeding, by ordering the money to be paid out of Court, thereby impeaching the validity of the mortgage and leaving the mortgagors without remedy. The Attorney General abandoned the claims for the full amount, but contended that under the provisions of Act 19th Vic., cap. 14, these claimants being servants of Boutin, had a right to be paid their last year's wages, and that in order to maintain that claim under the Act it was not necessary for the employer to be formally declared insolvent, but that if he transferred his property, communicating the fact of his being insolvent, the servants would have a lien on the property for their wages, and that the rule would apply as well to general servants as to those engaged in the fishery, but in this case all were fishery servants, and that such communication and notice was made through Wakely, Weir & Co's agent. Mr. Whiteway contended that a general servant had no such lien, but only had a preferable claim on the general estate upon a formal declaration of insolvency. That Fitzgerald was a store-keeper and general servant and there were no funds belonging to the estate in Court. That the fishery servant's lien only extended to fish and oil and not to other property, and could only be sustained upon a clear proof of notice prior to the receipt of the fish and oil and that in this case it was not sworn that notice had been given; but it was merely argued from circumstances that Weir & Co. must have known of such servants claims, but that Mr. Wyld in his affidavit positively negatives such knowledge.

Judgment of the Court.—Let the three servants be paid the amounts of wages reported by the master to be due to them for the current year out of the proceeds of fish and oil realized, it being sworn that they were engaged in the fisheries during that year.

Mr. Whiteway for certain creditors.

Attorney General for servants.

1860, *January*. BY THE COURT.

Criminal law—Concealment of birth—Evidence necessary to sustain indictment.

In an indictment charging concealment of birth, in order to sustain the indictment evidence of the disposal of the body, with a view of concealing, must be clearly established.

THE defendant was indicted for endeavoring to conceal the birth of her infant child by placing the body of said child between her bed and the lacing thereof. The prisoner is a single woman, and served one William Walsh as a fishery servant on the Labrador during the past summer. In the month of June she was confined, and was delivered of the child—no one being present. The fact of her pregnancy was known to her fellow-servants; she had not stated it to them; a woman had been sent for to attend her. There was no direct evidence of her having placed the body of the child between the bed and the lacing, merely that she had denied its birth; when asked for the body of the child she took it, as was thought by the principal witness, from between the bed and the lacing of the bed—but this witness would not positively swear whether it was so or not; no clothes were prepared or other provision made. The counsel for the prisoner moved for her discharge, there being no evidence of the disposal of the dead body of the child, or any endeavor by prisoner to conceal the birth thereof, as laid in the indictment.

The court then took the matter into consideration, and decided that the charge as laid in the indictment had not been proved or sustained by evidence, and ordered the prisoner to be discharged.

Attorney General for the crown.

Mr. J. P. Little for defendant.

1860, *January*. HON. MR. JUSTICE ROBINSON.

Insolvency—19 Vic., cap. 4—Assignment with a view of defrauding creditors—What is necessary for petitioner to show before he can obtain the benefit of the Insolvency Act.

In an application for insolvency the law requires the petitioner to make it appear to the satisfaction of the judge that he is insolvent before such judge can give petitioner the benefit of the Act.

THE insolvent was called up and examined and cross-examined and counsel heard, when his lordship reserved judgment, which he delivered at a subsequent day as follows :

This case came before me as a judge in chambers under the 19 Vic., c. 14, on the petition of William Morison, boot and shoe maker, to be declared insolvent and to have the bail bond, given on his behalf in the action Ewen Stabb vs. Wm. Morison, delivered up to be cancelled. The law requires the petitioner "to make it appear to the satisfaction of the judge that he is insolvent before such judge can give him the benefit of the Act." On the schedule filed by him his debts amount to the sum of £304 18s. 4d., and his assets to the sum of £256 2s. 11d., leaving an alleged deficiency of £48 15s. 5d due by him. His creditors strenuously contend that the petitioner is not insolvent, for that a brick house and furniture in Water street belong to him which ought to be invested amongst his assets, the value of which would be more than sufficient to enable him to pay all his debts. The petitioner, on the other hand, alleges that the said house and furniture do not belong to him, as he assigned them, together with his stock and tools of trade, in April, 1858, to his brother in trust for petitioner's wife and children; and it is contended for him by Mr. Pinsent, and for the wife and children by Mr. Hoyles, that such assignment is valid, because the petitioner was then solvent and because he did not make the assignment with intent to defeat the just claims of his creditors. To establish these positions, as well as the fact of his present insolvency, the petitioner has been examined on oath and cross-examined by the Attorney General, Mr. Carter, Mr. Whiteway, Mr. Hayward, Mr. O'Donnell, on behalf of respective creditors; he stated that the value of the house and furniture is from £600 to £700; he put in a statement of his affairs in April, 1858, from which it appeared that he was then indebted to sundry creditors for the sum of £209 14s. 8d., to each of whom he stated he is still indebted, as he

was not then and has not since been able to discharge their claims; that he then had cash debts due to him amounting to £233 5s. 9d., which he has since received and expended principally in the support of his family, and he could not afford to appropriate the money in the discharge of his debts; that he made the assignment without valuable consideration for the protection of his wife and children, and that he might secure for them at any rate a house, because his trade was failing and had been failing since 1855 or 1856; that in April, 1858, he could not have paid off his debts without selling this property, but he hoped for better times; that he has continued in possession and use of the house and furniture from that time to the present; has paid the monthly charges of the house to the building society up to November last; has continued to use the tools in his trade, and has appeared to the public as the owner of the premises, adding "that this assignment would never have seen the light if times had prospered with him." He also stated that when he made it he was indebted to the building society in the sum of £186 or thereabouts, for which the house was mortgaged, which sum did not appear in the statement of his liabilities in 1858 and that he was also at that time indebted for ground rent in the sum of £65, which was also omitted from the statement. These two items, amounting to £249, when added to his other liabilities would shew that the petitioner was on his own statement, without the property assigned, unable to pay his debts when he made that assignment, even at the valuation he had put upon some items of his assets which appear to have been over-estimated. On this state of facts Mr. Carter cited 13 Eliz. c. 5, which was passed for the protection of creditors, and enacts "that every conveyance of lands or goods made with intent to defraud creditors of their just debts shall be utterly void, as against such creditors." And he and counsel for several other creditors contended that the deed made by the petitioner came within the operation of that statute and is void.

The test usually applied to ascertain the "intent" with which a deed is made with reference to this statute is the state of the grantor's affairs at the time of making it, for the intent is not often proved by direct evidence so clearly as in this case; if he had not abundance of property to pay his debts without that assigned, the law would infer that the conveyance of his property to one who was not a creditor was made with the in-

tent of defeating the just claims of those who were. Indeed it is laid down that a deed made without adequate consideration to defraud creditors would be void even at common law. In this case the evidence of the petitioner himself satisfies us that when he executed the conveyance of his money and stock to his brother he was, without that property, unable to pay his existing debts. And the reason that he candidly gives for the assignment is conclusive that his intent was thereby to remove the property from the reach of his creditors, and by means thereof to defeat their just debts.

Mr. Morison appeared to think that the object for which he proposed to convey his property was laudable and lawful, and certainly it is not only allowable but commendable in every man to provide for his wife and children, but it should be known that such provision must not be made at the expense of his creditors, who may have wives, families and debts of their own to provide for, and who are entitled to expect from courts of justice protection. "Every man must be just before he is generous." The petitioner seeks for himself the benefit of the insolvent law; he cannot have it if he be not within its operation, and the evidence in this case leaves no room to doubt that the property mentioned in the assignment never passed away from the petitioner to the prejudice of the just claims of his creditors, but was and is assets for the liquidation of his debts. I therefore dismiss this petition because the petitioner has failed to satisfy me that he is now insolvent.

Mr. Pinsent for petitioner.

Mr. Hoyles, Q. C., for wife and children.

Attorney General, and *Messrs. Carter, Q. C., Whiteway, Hayward and O'Donnell* for various creditors.

1860, *January*. BY THE COURT.

Costs—Costs of fishery servants who attach the proceeds of the voyage when their employer is insolvent.

Where servants having a claim on the whole of the voyage until their wages are paid, take proceedings to secure the voyage for the payment of their wages, they are entitled to be paid the costs of such proceedings out of the proceeds of the voyage up to the time of the insolvency.

THE Hon. the Attorney General, counsel for two servants of insolvent, had obtained a rule *nisi* to shew cause why they should not be paid the costs of two actions taken by them against the insolvent, under which some fish and other property previously assigned to Messrs. B. Weir & Co. by the insolvent, had been attached and the proceeds paid into Court.

Mr. Whiteway, for Messrs. B. Wier & Co., had also obtained a rule *nisi* to shew cause why the said monies in Court should not be paid out to them. It was contended by the Attorney General that the practice was to allow the attaching creditor his costs up to the time of insolvency out of the insolvent estate, and that the funds in Court belonged to the estate and that upon such costs being paid, he had no objection to the residue being paid to Messrs. B. Weir & Co.

Mr Whiteway contended that the funds in Court did not belong to the insolvent estate, but were the property of B. Weir & Co., under the assignment which had not been impeached. That the Court had on a former occasion ordered these servants to be paid their current year's wages out of the funds in Court to the extent of the proceeds of fish and oil attached and sold under the provisions of act. That these funds must therefore be considered in the same position as the receiver of the voyage of a planter, with notice of servants' claim on the voyage for wages. That the statute gives the servant an immediate right of action by which he is enabled to recover against the receiver to the extent of the voyage received upon satisfactory evidence of the insolvency of the planter; that this act ought to be strictly construed as regards the right; and that the servants could in an action against the receiver recover the costs of a former action against the planter, which would be the effect of allowing their servants their costs in their suits.

The Court determined that the servants having a claim on the whole of the voyage until their wages were paid, and that proceedings having been taken to secure the voyage for the pay-

ment of their wages, that the costs up to the time of the insolvency should be paid them out of the proceeds of fish and oil in Court, and that the balance of the funds should be paid out to B. Weir & Co.

Attorney General for servants.

Mr. Whiteway for certain creditors.

IN RE INSOLVENT ESTATE OF McDONALD.

1860, *January*. HON. MR. JUSTICE ROBINSON.

Sheriff—Charges on property sold under rule of Court by *Sheriff*, to which he is entitled.

The Sheriff is not in strict law entitled to anything for keeping an officer in charge of a house after the goods are removed. On the sale of goods by the Sheriff the Court has authority to authorise the payment of a commission.

IN this case the sheriff's charges on property sold under rule of Court, were referred to the master to report upon.

The report now came on for argument

The principal charges objected to were £39 4s. actually paid to the bailiff for taking charge of the house after the goods were removed; £42 cartage, &c., in removing the articles to and fro repeatedly; £15 for advertising; £100 storage, and the auctioneer's commission for the sale of the goods.

Mr. Justice Robinson—The Chief Justice concurs with me that the Court has no power to allow the sheriff more than the rules of Court prescribe. The first rule gives five per cent. on *all property* attached; the subsequent rule gives an additional sum of five shillings per day for the charge of goods. The Court was therefore constrained to say that the sheriff was, in strict law, entitled to nothing for keeping a man in charge of the house. Secondly,—with regard to the auctioneer's charge—no authority of the practice in England or elsewhere has been cited—it would appear therefore to be unsupported by precedent. The Court had power to authorize the payment of commission to save the sheriff trouble. (The learned judge here cited the *King vs. Crakensthorpe, 2 Antruther*) but the Court wished it to be particularly understood that they felt themselves

deterred by strict law from allowing the charge; for they believed the creditors had greatly benefitted by the course taken in the employment of an auctioneer, and that they ought to make a liberal allowance to the sheriff on that account—the goods had realised nearly £50 more than they had been appraised at. It was manifest that the sheriff, the highest executive officer of the Court, could not be expected personally to sell such things or to know how.

Attorney General for plaintiff.

Mr. Hoyle, Q. C., for creditors.

IN RE INSOLVENCY OF JOHN HOGSETT.

1861, January. HON MR. JUSTICE LITTLE.

Insolvency—Application for certificate and final discharge—Fraud, what is necessary on the part of insolvent to constitute.

When the ground set up for refusing a certificate of insolvency and final discharge is "contracting debts without a reasonable or probable expectation of paying them," in order to succeed, it is necessary to show, that the debts were fraudulently contracted, without hope of being able to pay.

AN application has been made to me to grant the insolvent a certificate of discharge from his liabilities according to the provisions of the laws of this island, made for the relief of insolvent debtors. It appears that he was declared insolvent on the 4th July last; that the same gentlemen were appointed trustees of his estate as had acted as assignees thereof from the month of July last, when he made an assignment thereof to them for the benefit of his creditors generally. He has sworn that he has not been guilty of fraud in relation to any of his creditors, and has not, to the best of his judgment, knowledge and belief, rendered himself liable to imprisonment for fraud or any misconduct under any of the existing insolvent laws, and that he has made a full discovery, disclosure and delivery of all his property and effects, under his insolvency, to the trustees of his estate. The required notice being given of this application, it was resisted by the trustees on several grounds. It was alleged that his speculations were not warranted by his capital; that he must have anticipated loss on

his shipments of last year from his previous experience in the trade; that he must have been aware he would not be able to meet the liabilities he incurred to make the shipments; that he had not fully accounted for all the cash entered in the books of his estate received by him while he was acting as the agent of the assignees; that this application was premature, as sufficient time had not elapsed since his declaration of insolvency to enable the trustees to ascertain the state of his affairs with his foreign debtors; that upon selling a bill of exchange for £500 to Mr. Bryden, it was purchased under a conviction, based on a statement previously made by the insolvent, that he had no interest in the shipments he was making; and other markets, referred to hereafter, were also urged. Mr. Dickenson, one of the trustees, and Mr. Bryden, were examined in support of the objections, and the insolvent was examined in reply to them.

The answers given on oath by the insolvent to these statements were: that his speculations, which were in fish, were in the ordinary course of the trade of this colony; that besides his own capital he had an open credit for 1860 with Messrs. Cole & Co., his principal creditors in London, (whom he owes £5,554 9s. 3d.), of £1,000 at first, and then increased it in advance to £5,000 on the faith of the shipments, which were made with their approbation; that he fully expected to meet his liabilities on account of the shipments, and to gain a handsome profit; that owing to bad markets, the failure of consignees, and the quality of the fish turning out bad, his failure had taken place; that he had fully accounted for all the cash received by him on account of his estate; but there were three items to the debit of cash, received for three quarter casks of wine, which were consigned to him and did not form part of his estate and were not posted in the estate account, and all the other monies were accounted for in the accounts produced; that Mr. Cowan, his nephew, had been several months in Spain endeavouring to realize the claims on the Spanish debtors of the estate, and since the date of the assignment to the assignees in February they had been fully advised of his transactions and correspondence; that he sold three bills of exchange to Mr. Bryden at different times, in all amounting to £1,500, and, upon selling the first, he may have said it was drawn against shipments in which he had no interest, or, if he had, he hoped to make a handsome profit by them; that he made six or seven shipments on which he had no interest; that bill was paid, as well as another subsequently sold to Mr. Bryden, and when he

sold him the last for £500 he fully expected it would have been paid as the others had been; that the first bills were sold in the early part of October, and the last, later in the year, and upon four months notes, which made the premium lower than the market price of exchange at the time. On Mr. Bryden's examination he admitted the conversation as to the insolvent having no interest in the shipments, or if he had that he would make a handsome profit by them, had reference to the purchase of the first bill which was paid; that he had no conversation on the point after that with him, but purchased the other bills on that belief; that, on buying the first bill, he said to the insolvent he would prefer a bank bill or first-rate merchant's bill, and the other replied that his bill was as good as the majority of merchant's bills.

As to the other objections the insolvent also swore that Mr. McPherson has an unsettled claim for a rise on fish about equal to that on the schedule against him, and he has paid him several sums for supplies furnished to dealers of the insolvent since the assignment. That Sinclair Hamilton's account appears in the books of 1860, and was closed by a bill not paid, and that was the reason it did not appear in this year's books; and two others—Gordon, Bruce & Co., for £40, and Melliish & Sons for £11—did not appear there because one of them was not furnished and the other was disputed. That there are debts appearing in his books amounting to £900, not put in his schedule, as the parties apparently owing them have offset, not furnished equal to the amount; that besides the six or seven shipments of fish made last year in which he had no interest, he took a joint interest in those named in the memorandum produced, under the belief that the foreign consignees who were jointly interested were persons of the first respectability. That he is now not worth sixpence in the world, and the day after his declaration of insolvency he had to get credit for one lb. sugar and one lb. tea for the use of his mother and himself.

Upon a full consideration of the case I felt that, looking to the fact that the insolvent had only obtained his declaration on the 3rd July, a sufficient time had not elapsed to enable the trustees to notify the foreign debtors of the insolvency and their appointment, as such a notice appeared to me to be necessary in law to perfect a transfer of their liabilities to the trustees. I, therefore, postponed the matter until to-day, the 10th August, to enable them to effect that object. It is for

me now to dispose of the application upon the other grounds according to the evidence laid before me and the provisions of the insolvent laws. The evidence in support of the application appears to me to answer all the points raised against it and to clear them up in such a manner as to enable me to dispose of what at first appeared to be important and well-founded objections. It is not necessary that I should recapitulate the evidence. The only points to which I deem it necessary to refer are the charges against the insolvent of trading beyond his means, and that connected with the sale to Bryden of the last bill.

The insolvent laws were passed for the benefit of honest but unfortunate debtors, who failed through the adversities of trade, to which all engaged in it are more or less liable. If their debts are contracted fraudulently, or without a "reasonable or probable expectation" of paying them, they are liable to be imprisoned for a period not exceeding three years, and a bar is thus interposed to their obtaining a certificate during that period. If, on the other hand, their conduct is not open to a substantial charge of fraud or other misconduct in relation to their creditors, upon a full surrender of their property, they are entitled to their certificate, which enables them to begin the world anew. Now, the insolvent has sworn that when he contracted his liabilities he had a reasonable and probable expectation of paying them, and that he shipped fish in the usual course adopted in the trade on his own as well as on the account of others, and that he was led to believe that his foreign consignees and co-shippers were persons of undoubted respectability. The result was unfortunate for all concerned. I presume the creditors were aware of the nature and extent of his trade when they sold him their merchandise, and must have known the risk they were running, for I observe among them the names of some of the most intelligent in the trade of this community. While, therefore, I deprecate in the strongest terms overtrading and reckless speculations with the means of other persons, and all extravagant personal expenditure as highly culpable, yet I am bound to judge each case according to its circumstances, and the evidence in the present instance does not in my judgment fail to support this charge. Where the facilities for obtaining credit are apparently so great, as this case illustrates, it is clear to my mind that the creditors were content to share the risk, and a judge cannot be expected, when their anticipations have not been realized, to

regard the conduct of the debtor in taking credit in a more unfavorable light than they did when they gave it to him, if they were aware of the facts, unless subsequent circumstances impeached his integrity. If the markets and the quality of the fish shipped by the insolvent had turned out good he would have fared well by his speculations. The result has been otherwise, and the consequences must fall upon debtor and creditor.

As to the bill affair, Mr. Bryden's *viva voce* testimony, fairly considered, clears up that transaction. He assumed, perhaps not unreasonably, that previous conversation with reference to the first bill also applied to the last, though a separate transaction effected a considerable time afterwards, and that as the two prior bills were honored, the last would have been paid also. This is, no doubt, a very hard case, being a cash transaction, and it is not unreasonable that he should feel the hardship of it severely. But he seemed to have a doubt about the bills in the very commencement when he said he would prefer a bank bill or a first rate merchant's bill, and took the last on what were deemed accommodative terms. It was in consequence of the shipment's failure to realize the funds that it was not paid, and I do not see that I can attach fraud to the conduct of the insolvent on this transaction. As to the expenditure of monies in purchasing supplies for dealers, &c., I disposed of that point on the original application. Upon the whole case I am therefore of opinion that I am bound in law to grant the certificate.

1861, *January*. ROBINSON, J.; LITTLE, J.

Criminal law—Discharge of prisoners for want of trial—Under General Goal Delivery—Under 14 Geo. III.—Under Habeas Corpus Act, sec. 7—Under Discretionary Power of Court—Constitution of Court necessary to discharge prisoners—Bail.

The same jurisdiction in the Court is necessary to discharge a prisoner on a charge of capital felony for a want of trial, as for his trial.

The Act 14 Geo. III., does not affect the commitment of prisoners, and seems only to relieve them from oppressive fees when discharged.

To avail of the relief afforded by the 7th section of the Habeas Corpus Act, a petition must be presented the first day of the first week of the term of Court; the fiction of law that "the whole term is one day," is not applicable to an enactment which prescribes something to be done on the first day of the term.

THIS is an application by Mr. Pinsent on behalf of the two first named prisoners, and the Attorney General agrees that the decision of the court shall extend to the last three, all five being committed on a charge of murdering Isaac Mercer. The application on behalf of the prisoners is,—

First,—To have them discharged by the court by proclamation under the general authority it possesses of "Gaol Delivery," there having been no indictment preferred against them during the term now closing. Or,

Secondly,—To have them discharged under the provisions of the 14 Geo. III., which enacts that every prisoner charged with felony before any court holding *criminal jurisdiction*, &c., against whom no bill of indictment shall be found, or who shall be acquitted, or discharged for want of prosecution, shall be set at large without fee. Or,

Thirdly,—To have them admitted to bail under the 7th section of the Habeas Corpus Act, which provides that if any person shall be committed for felony and *shall have presented his prayer or petition* in open court the first week of the term, or the first day of the session, and shall not be tried during that term, he shall be bailed. Or,

Lastly,—To have them bailed under the discretionary and plenary power which the court admittedly possesses to admit to bail in all cases.

I shall dispose of each ground of application in the order in which it has been urged.

First,—This court as it is at present, and has been during the term constituted, with but two judges present, does not possess by law the power to hear and determine capital felonies, for which purpose “three judges shall be present”; we could not therefore have entertained this case, we could not have sent a bill before the grand jury, and could not have tried it if one had been found. I doubt then our power to discharge a prisoner for want of trial when we had not the jurisdiction to try; Lord Mansfield’s dictum in Platt’s case, *1 Leach, cc. 203*, warrants me in entertain this doubt, his lordships words are “the application to discharge by proclamation must be made to that court only which had jurisdiction to try.”

Second,—The above reasons apply to the second objection with this additional one, that the Attorney General appears here as public prosecutor and opposes this motion, and therefore the assent of the crown cannot be assumed as if the application had passed *sub silentio*. Moreover the 14 Geo. III., was passed with the express object—not of altering the law as regards the trial or commitment of prisoners, but solely to relieve them from oppressive fees when they were discharged.

Third,—The prisoners have not brought themselves under the relief of the 7th section of the Habeas Corpus Act, because they have not observed the prescribed mode of proceeding, not having presented any prayer or petition in the first week or first day of the term. The fiction of law that the whole term is one day is obviously inapplicable to an enactment which specifically defines what shall be done on the “first day,” or the “first week,” besides that argument was used, but without effect, in *R. v. Bowen*, *9 C. & P. 510*.

On none of the three first grounds, therefore, do I think the prisoners are entitled to be discharged.

As to the last ground, viz., to admit to bail. After an auxiliary consideration of the circumstances of this case as detailed in the depositions, and after an examination of the several authorities in England, which ought to direct the exercise of our discretion in such matters, I have arrived at the conclusion that the prisoners ought to be admitted to bail.

They have—at least some of them—been imprisoned since February, they might have been tried if the court had been full, and as the absence of a third judge was not their fault, it should not operate to their prejudice. Under the accustomed

practice of the court there will not be another term until the end of November, and with these considerations in their favor I have carefully weighed the circumstances under which the homicide occurred, and the facts detailed in the depositions in order to discover whether the evidence of premeditation is so conclusive, and the conduct of the prisoners of so flagrant and dangerous a type as to forbid the admitting them to bail; I deem it proper to avoid as much as possible expressing any opinion which might affect on the trial the prosecution or the prisoner, and therefore all I say is that I feel at liberty and, as a consequence in law of such liberty, am bound to admit the prisoners to bail.

I wish it to be observed and understood that my judgment in this case has been influenced solely by the particular circumstances of it; every case in which the discretion of the judge is the rule of his action, must depend upon its own peculiar features.

I have only one more remark to add, which arises out of an observation made by Mr. Pinsent in the course of his lucid and effective address to the court. When I reflect upon the serious responsibility resting upon the Attorney General, to see that violators of the public peace are punished and restrained, that the guilty are not suffered to escape, that the laws of the land shall be practically felt by all its inhabitants as a sufficient protection, without their being under the necessity of having recourse to their own arm to defend their rights, and that so far as in him lies, he should take care that fair, equal and impartial justice is dealt out to all prosecutors as well as prisoners; I say, taking these matters into consideration, I find no blame whatever directly or indirectly to be imputable to the crown prosecutor for not bringing this case to trial under existing circumstances.

HON. MR. JUSTICE LITTLE:

In this cause an application has been made to this court on behalf of the prisoners to discharge them from gaol, where it appears they have been confined since the 20th February last upon a charge of the murder of one Mercer, at Bay Roberts. The grounds of the motion are that they have been ready to take their trial during the term of this court, which closes to-day. That this being the Supreme Court of the Island, and as such, under the Royal Charter and Judication Act, having the

express power and authority conferred upon it of a Court of General Gaol Delivery, and of the Court of Queen's Bench, the prisoners ought to have been tried or discharged by proclamation for want of prosecution. That this being the last day of the term, it is the duty of the judges of this court of common law to deliver the gaol of all persons who are therein confined, awaiting their trial for such a period as the prisoners have been there. That this power is inherent by the common law in a Court of General Gaol Delivery, according to the authorities cited, amongst which *4 Step. Com. 361*, states that a commission of general gaol delivery "empowers them (the judges) to try and deliver every prisoner who shall be in the gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted, or for whatever crime committed," and in *Hale's Pleas of the Crown, 33*, it is said, "if no indictment be preferred against the prisoner during the term of the Court of General Gaol Delivery held while he is in gaol, he ought to be discharged." The statute 14 Geo. III, c. 20, has also been relied on for this position. It enacts that "every prisoner charged with any felony or any other crime, or as an accessory thereto, before any court holding criminal jurisdiction within England and Wales, against whom no bill of indictment shall be found by the grand jury, or who on his or her trial shall be acquitted, or who shall be discharged for want of prosecution, shall be immediately set at large in open court without payment of any fee or sum of money to the sheriff," &c.

Secondly, that they are entitled to be bailed, if not absolutely discharged, upon the authority of the 7th section of the Habeas Corpus Act, which declares that, "If any person committed for treason or felony shall on the first day of the sessions of gaol delivery after such commitment, petition the court to be set at liberty upon bail, the justices are required to bail such person, unless it appear upon oath that the witnesses for the King could not be produced the same sessions. And if the prisoner shall not upon his application be indicted and tried the second session, he shall be discharged from his imprisonment." And thirdly, that this court, in the exercise of its discretion will bail the prisoners, as the charge would only amount to manslaughter upon the evidence, and it is not conclusive even for that against them. That the accused joining in the customary diversions of persons of their class at Christmas or New Year holidays in this community, went out as *mummers* or *johnnies*, as they are called in Bay Roberts, dressed as usual in disguise,

striking with sticks or other weapons, which they had in their hands, those they met That they and other mummies, it is alleged, came into contact with the deceased, and some of them struck the deceased a blow or blows on the head which proved fatal. That one Hedderson, who is charged by the evidence as an accomplice, has been bailed. That no malice prepense was shewn to exist between the accused and the deceased. In support of this last position several authorities were cited, shewing that where prisoners charged with felony have not been prosecuted by reason of the absence of witnesses for the crown, the courts in England have discharged the prisoners on their own recognizance.—*Reg v Crow*, 4 C. & P., 251; 9 C. & P., 456.

The Attorney General opposed this application; first, denying that the Supreme Court as a Court of General Gaol Delivery has power to discharge prisoners against whom no bill has been found, as contended for. He admitted that the crown witnesses were available, and could have been had. But further contended that even if the court had such power, it could not exercise it in the absence of the third judge, as the presence of three judges were necessary to hear and try capital felonies, and the Chief Justice having been absent during the term, the parties could not be indicted or tried. That the prisoners were not, therefore, entitled to the benefit of such a right if it existed, and that they had not given the notice required by the 7th section of the Habeas Corpus Act on the first day or week of the term to entitle them to the benefit of that Act, and that the statute of 14 Geo. III. had no application to the case. It was replied for the prisoners, with much force, that as regards the objection to the constitution of the court, it did not become the Attorney General, as the representative of the crown, with a full knowledge of the circumstances, to urge the want or absence of a third judge as a reason for keeping the accused in gaol, as the Executive had the power to appoint a third judge to preside in this court during the absence of the Chief Justice; and if they did not appoint one, the administration of justice should not be stopped, or the imprisonment of the accused might be indefinitely continued without redress.

Having given the arguments and authorities of both sides my best consideration, I have come to the conclusion that whatever the authority of this court may be when fully constituted by three judges, in relation to the discharge of prisoners, against whom no bill of indictment has been found, under such circumstances as exist in the present case we have not

authority, in the absence of a third judge, either to try the prisoner or discharge him by proclamation, the charge being for a capital felony and the presence of three judges being expressly required for the trial of such a case by the law of the colony.

But after a careful perusal of the depositions, and due consideration of the facts stated therein, I think we are bound to discharge the prisoners upon giving satisfactory bail to take their trial in the next term of this court, as there is an absence of proof of malice or premeditation on their part upon the charge in question. It is not expedient that we should enter into any further discussion of the evidence upon a preliminary application of this kind. Let the prisoners therefore be discharged on giving bail before the stipendiary magistrates of St. John's, themselves in £200 each, and two sureties in £100 each, to stand their trial at the next term of this court.

Mr. R. J. Pinsent for prisoners.

Attorney General for the crown.

KELLY v. HARVEY AND FOX.

1861, *January*. BY THE COURT.

Contract—Erection of rear wall of house, by perch—Deduction from contract price for openings of doors and windows—Usage of trade.

Where in an action for the price of a certain number of perches of stone, which represented the complement which would have been required to complete the rear wall of a house, the Court left it to the jury to say whether there was a usage of trade which justified the contractor in charging for the full entire contents of the wall as if there had been no openings, on the grounds assigned, that the material and labor was greater and more expensive surrounding the openings.

ACTION taken to recover the value of a quantity of mason work—the rear wall of a house. The plaintiff contended that his contract being by perch work, no deduction could be made for the openings for doors and windows. The defendant refused to pay for the work unless deductions were made for the openings. The plaintiff supplied the materials.

The price was 25s. a perch. The plaintiff and several other witnesses in the trade were called, who proved: That it was not usual or customary to deduct the openings in mason-work,

either for labor or materials in the absence of an agreement to the contrary. Some evidence was given that for openings amounting to seven or eight feet each some deduction ought to be made.

Mr. Freeman proved the measurement—248½ perches.

Mr. Carter addressed the jury for defendants, and called defendant, Mr. Harvey. Mr. Meehan—to prove the circumstance of the agreement, and the payments in account, also the measurement—190½ perches, 51½ openings. Other witnesses were called; who proved a contrary usage to that alleged in the plaintiff's case, viz., that when the contractor supplied material and labor, deductions to the extent of the openings ought to be made in the measurement of the work; and when labor only was contracted for, deduction for spaces over five feet wide were only made—the comparative value of labor and materials in rubble work—the labor would be one-third of the whole, in brick-work less than one-fourth.

It was an action taken to recover the sum of £40 12s. 6d. on a building contract. It is an unfortunate circumstance that the agreement between the parties was of such an uncertain character. If it had been in writing, probably all this investigation would be saved, the rights of the parties would be defined, and all the litigation prevented. The substantial difference between the parties appeared to be the value of about 50 perches of mason-work, being the amount of the openings for doors and windows in the wall. His lordship reviewed the evidence and left it to the jury to say upon the whole case, if there was any honest and reasonable usage of trade to justify the claim; the reason assigned for this usage was that the work and materials surrounding the openings were of a superior character, and the labor greater; the only case in point appeared to be that of the Wesleyan Chappel, built under circumstances when the openings were deducted.

It was left to the jury, giving the whole case a fair and reasonable consideration to determine what, if any, they would allow to the plaintiff, and to say whether those openings were to be deducted either in whole or in part, or had measurement allowed for them as claimed by the plaintiff.

Verdict for the plaintiff, £40 12s. 6d.

Mr. Pinsent for plaintiff.

Mr. Carter for defendant.

1861, January. HON. MR. JUSTICE ROBINSON.

*Insurance—Marine—Deviation—Terminus ad quem—Terminus a quo—Forfeiture
of Insurance—Practice—New Trial.*

Insurance was effected on goods on board the *British Queen* "for one voyage at and from a port at Labrador to St. John's, Nfld., commencing the risk from the loading thereof." The vessel had been fishing along the Labrador during the summer and had returned to Indian Tickle, and from there the owners wrote for insurance. At Indian Tickle they took on board part of their voyage and proceeded to Salt Pond on the Labrador, a distance of 100 miles; there they lay for one month; dried their green fish and caught some herrings. Whilst at Salt Pond the insurance was effected. On the voyage from Salt Pond to St. John's the vessel was lost.

Held—(Brady, C. J., dissenting)—The insurance contemplated a risk from one port to St. John's, and going to Salt Pond was a deviation and worked a forfeiture of the insurance.

WE are of opinion that the verdict in this cause cannot stand. It is quite true, as stated by Lord Chief Justice Lee, "that *Strictum Jus* is not to be laid hold of, for policies are to be construed largely for the benefit of the insured; but underwriters have likewise their rights, and contracts of insurance must be governed by the language which the contracting parties have used therein."

In this case the insurance was effected on goods on board the *British Queen* for one voyage, viz, at and from a port at Labrador to St. John's, commencing the risk from the loading thereof.

The vessel had been employed during the summer fishing along the Labrador; on her return to Indian Tickle with green fish, the owners wrote from Indian Tickle for insurance. There they took on board some dry fish, and oil, part of their voyage, and proceeded to Salt Pond—distant about 100 miles—for the purpose of making their green fish and catching herrings. They remained at Salt Pond a month; the insurance was effected whilst the vessel lay there; and having dried their green fish and caught some herrings, they sailed from Salt Pond for St. John's, and the vessel was lost, with her cargo, on that voyage.

At the trial, Mr. Hoyles moved for a non-suit, on the grounds that the policy only covered a risk from one port to St. John's; that the insured had commenced the voyage at Indian Tickle, and that going into Salt Pond was a deviation, and worked a forfeiture of the insurance. We agree in the proposition that the voyage insured was from one port only, and that it would

be a violation of law as well as language, to hold that "a port" meant "ports"; we also agree that if the loading, for the voyage insured, commenced at Indian Tickle the insurance would be nullified by going into Salt Pond; but we do not think that there is ground for a non-suit, because the questions—first, as to where the voyage insured commenced; and, second, whether the goods were lost on the voyage insured, and if so,—third, what was the value of the goods loaded for that voyage and so lost, were all questions of fact for the jury, and not for the court.—*Palmer vs. Marshall*, 8, Bing. 80. In determining what was the voyage insured, the terminus *ad quem* should be regarded as well as the terminus *a quo*.

Mr. Carter for the plaintiffs, on the other hand contended, and we think with much force, that "Salt Pond should be deemed the port of loading; and if that be so, we are clearly of opinion, on the authority of *Park vs. Hammond*, *Mellish vs. Allnut*, *Rickman vs. Carstans*, and several other cases, that the goods which had been loaded prior to the arrival of the vessel at Salt Pond, and not there landed or disturbed, were uninsured, and should not have been considered in the verdict as they were. We were not required to leave any of these questions to the jury, and the verdict is inconsistent with any legal view of the case. It has been suggested that the judgment of Lord Ellenborough in *Vallance vs. Dewar*, 1 Camp., is authority to show that by usage, where a policy is effected in England on a fishing vessel at and from Newfoundland, the risk only commences on the termination of the fishing. Whatever may be the effect of that judgment, it is sufficient to observe that on the trial of this case no evidence of any usage applying to vessels insured in this colony, and to return from Labrador to a port in this colony, was offered; and indeed the plaintiff's counsel could hardly have anticipated the necessity of such evidence, as the testimony of Mr. Bulley, the agent of defendants, justified him in believing that the only objection that the underwriters had raised before the trial was that the value of the property claimed for was too large. On the whole case, we are convinced that the ends of justice require that the verdict should be set aside, and a new trial granted; whilst the interests of commerce demand that the important questions raised should not be left in doubt, but should be settled by a judicial determination, when the issues shall have been properly raised.

His lordship the chief justice requests us to say that he dissents from the conclusion we have arrived at, as he thinks the policy attached at Indian Tickle, regarding it upon the argument, as the first port of loading, and that proceeding to Salt Pond was a deviation, and therefore that the motion for a nonsuit ought to prevail.

Let the verdict be set aside, and a new trial granted, the costs to abide the final determination of the suit.

Mr. Carter, Q. C., for plaintiffs.

Mr. Hoyles, Q. C., for defendants.

EARLE v. SIMMS ET AL.

Trespass—Assault and battery—Removal of Clerk of St. Thomas's church, St. John's, from Clerk's pew—Right to appoint and dismiss Clerk of St. Thomas's church—Practice—Rule nisi—Setting aside verdict—Misdirection.

On the 19th of January, 1838, the Reverend Archdeacon Wix appointed the plaintiff, Henry Earle, to be the first clerk of St. Thomas's church, St. John's. In 1839 Bishop Spencer by an instrument under his seal confirmed the said appointment, and the plaintiff continued to hold the appointment for twenty-one years. In 1853 the Reverend Mr. Wood was appointed Minister of Saint Thomas's church, under an instrument from Bishop Feild, not over the parish, but over the congregation; subject however to the rights of the Cathedral and the mother church. In 1859 Mr. Wood dismissed the plaintiff from his office of clerk. Bishop Feild denied the authority of Mr. Wood to make any such dismissal. The churchwardens upheld the decision of Mr. Wood, and on Sunday, November 6th, 1859, in the presence of the congregation assembled for Divine Worship, the plaintiff was forcibly removed from his pew whilst officiating in his robes as clerk. In an action for assault and battery the defendants justified the assault on the grounds that the plaintiff was not their clerk and had no right to be in the clerk's seat, and relied in support of their justification upon the validity of Mr. Wood's dismissal. The jury found for the plaintiff. On a motion to set aside the verdict for misdirection and improper rejection of evidence:

Held (discharging the rule)—The Rev. Mr. Wood had not in point of law power to dismiss the plaintiff. The right of dismissal is contingent on the right of appointment, and in this case vested in the Bishop of the Diocese. The position which Mr. Wood occupied in the church of St. Thomas, pursuant to his license and his own admission, was that of curate, which would not in England and did not in Newfoundland invest him with any authority to dismiss or appoint the clerk, and his dismissal of the plaintiff was nugatory.

HON. SIR F. BRADY, C. J.:

MY brother judges have gone so fully into the facts and circumstances of this case, and also into the law bearing upon it, I feel it is not necessary for me to do more than express my concurrence in the conclusion at which they have arrived. In my opinion, the verdict had in this case ought not to be disturbed, and the rule for a new trial ought therefore to be discharged, because it appears to me very plain from the facts in the evidence that the plaintiff held the office of clerk in Saint Thomas's church at the time the assault, of which he complains, was committed upon him by the defendants, and that he had therefore a right to maintain this action against them. The plaintiff was appointed by Archdeacon Wix many years ago; he was licensed as clerk by Bishop Spencer; and recognized as such clerk by the present Lord Bishop of Newfoundland for years before the Rev. Mr. Wood was appointed to St. Thomas's church. Mr. Wood, when he took possession of St. Thomas's church, also took without question the plaintiff as clerk of that church; and so far he appears to have recognized the right of the Bishop to appoint to this office, and also the right of the plaintiff to that office under such appointment.

From these facts it would appear that in 1853, when Mr. Wood was appointed, and until the differences out of which this action has arisen commenced, all the parties admitted the right of the Bishop to make the appointment, and if that right were in his lordship, Mr. Wood had no power or authority to dismiss the plaintiff; for it is laid down in *3 Burn's Ec. Law*, 86, "The parish clerk ought to be deprived by him that placed him in his office"; and therefore, on these facts, the dismissal by Mr. Wood would not afford any justification for the acts of the defendants. It has been argued, however, that the terms of the license from the Bishop to Mr. Wood confer upon the latter the power to appoint the parish clerk, and if they did so, he would undoubtedly also be the party to exercise the power of dismissal. The words relied on are, "We do by these presents license and collate you to our church of St. Thomas, in the town of St. John's, within our diocese and jurisdiction, . . . and we do charge you, in the Lord, with the cure of souls of the congregation and with the government of the said church"; and it is contended that the effect of these words in England would be to constitute Mr. Wood incumbent of a benefice, and thereby the law would confer upon him the right

to appoint and remove the parish clerk. Admitting that position, it is sufficient to refer to the reservation which follows these words in the license, viz., "Saving always, in all things, the rights and privileges of the Cathedral and mother church of St. John Baptist in the said town," to show that even in England the language used in this document would not constitute the minister an independent incumbent of a parish church, but a minister subordinate to the Mother Church, with only such powers and privileges as are by the language of the license given to him, and with an express reservation of all others to the rector or incumbent of the Mother Church. In England it will be conceded that the right of appointing and dismissing the clerk is *prima facie* one of the rights and privileges of the rector or incumbent of the mother church, and in my judgment the party who claims, as against the rector of the mother church, to have that right must prove that the latter has granted that power or privilege to him. No one will contend that a curate of a parish, or the minister of a chapel of ease, possesses this power or privilege as such curate or minister merely; but it remains in the rector of the parish; and in this country, where we have no parishes established by law, if I were to ask myself who is to be regarded as the person who possesses analogous powers and privileges to the rector or incumbents of parishes in England and Ireland in this country, I think I should be acting most safely in my desire to do right to all by adopting the rule laid down in *Burn's Ec. Law*, 283, which is as follows: "The cathedral church is the parish church of the whole diocese, which diocese was therefore commonly called *parochia* in ancient times, till the application of this name to the lesser branches into which it was divided, made it for distinction's sake to be called only by the name of diocese; and it hath been affirmed, with great probability, that if one resort to the cathedral church to hear divine service it is resorting to the parish church within the natural sense and meaning of the statute." And under that rule, I hold that the power to appoint and dismiss the clerk was, in the case before us, in the Bishop and not in Mr. Wood; and upon that view of the case I would be prepared to rest my judgment in this case, even if Mr. Wood's letter ought not to have been admitted in evidence.

With respect, however, to the objection to the reception in evidence of that letter, after the best consideration I could give it I am of opinion that the objection ought not to prevail; be-

cause I think that letter was evidence to show, at least to some extent, what were the powers and privileges reserved to the mother church under the clause for that purpose in the license, and if I am right in that view, the terms of that document, under the hand of Rev. Mr. Wood himself, puts an end to any doubt or difficulty that might otherwise exist as to the question of right involved in this case. Upon these grounds I am of opinion that the rule for a new trial ought to be discharged.

HON. MR JUSTICE LITTLE:

In this case, a rule *nisi* has been granted for a new trial on the grounds of the improper admission of evidence and misdirection in the judge's charge to the jury upon the trial.

This is an action for assault and battery, for turning the plaintiff out of the clerk's pew in St. Thomas's Church, in this town, which the plaintiff claims the right to occupy, as clerk of that church, by reason of his office, to which he was first appointed, over twenty years ago, by Archdeacon Wix, who built the church, and he was afterwards confirmed in the office by a license from Bishop Spencer, and recognized and continued therein by the present Bishop, Dr. Field. The principal defendants have attempted to justify their conduct, as church-wardens, acting under the direction of the incumbent of the church, the Rev. Mr. Wood, who claims the right of appointing and removing the clerk of this church, and who dismissed the plaintiff from the clerkship on account of a dispute which he had with the church-wardens about an organ fund, and gave the defendants orders to remove him from the clerk's pew, for which purpose they obtained the aid of the other defendants, who are police constables, and who use the force necessary to effect the object at the commencement of the service on a Sunday morning, in the presence of the congregation, contrary to the express desire of Bishop Field. The jury found a verdict for the plaintiff of £20 damages. The real question at issue upon the trial, and to which I shall confine my observations, was whether the Rev. Mr. Wood had the right to remove the clerk from his office; if he had, the defendants were justified in their proceeding, otherwise, they were not. The title to the land and church in question is vested in Dr. Field under a grant from the crown, and conveyances from his predecessor and Archdeacon Wix, in trust to hold the same for the purpose of a place of worship in connection with the Church of England.

In 1853 Bishop Feild licensed and collated the Rev. Mr. Wood to this church under a license which charges him "with the cure of the souls of the congregation and with the government of the said church, saving always in all things the rights and privileges of the cathedral and mother church of St. John Baptist in said town." Upon accepting the appointment to the church, and prior to the issuing of the license, Mr. Wood wrote a letter to the Bishop in reply to a letter from his lordship defining the position assigned to him in St. Thomas's church; in that letter Mr. Wood states "I am not acquainted with what may be the precise position of a curate to a town church or a chapel of ease where the mother church is just by, and the rector is enabled efficiently to attend to the general duties of the parish, but I wish to observe that in obtaining the Bishop's license as curate of St. Thomas's and that by the rector's expressed wish and recommendation, if I understand aright, it will be expressly as curate to St. Thomas's and not curate in ordinary to the parish of St. John's. I conclude that my service in common will be very much as if St. Thomas were a separate parish, only that I have to act as proxy for the rector, whilst the rector having charge of the cathedral parish is himself subject to the Bishop in such parish matters as the Bishop may choose to decide or control. St. Thomas being restored to its proper foundation, dependent on the parish of St. John's, it is but for me cheerfully to give up all emolument from that church and the mother church, such as fees," &c. "The provision which your lordship is pleased to offer of £100, partly from the pew rents and partly from the church society fund, in aid of my salary, I thankfully accept."

"I perfectly understand, in the parish settlement, that the rector will have occasionally to officiate in St. Thomas, and that the curate thereof may be required to do duty in Saint John's church; that it will be necessary for him to assist in visiting the people, to see them in their sickness, and to receive their contributions. But here again I would beg to observe, that in being licensed to St. Thomas and not as curate in ordinary for the parish of St. John's, I conclude that my sphere of labor will be for the most part in connection with St. Thomas's church, and the congregation attending there." In addition to this evidence, Dr. Feild proved that, as Bishop, trustee, and rector, he claimed that right of appointing the clerk, or at all events, of dismissing him. Now, if the rector, Mr. Wood, had been licensed and collated to this church by the Bishop, without any reservation, there could be no doubt of his right to appoint or

dismiss the clerk. But, upon the face of his letter of acceptance, and of the license, it is clear that his position, according to his own words, was that of "curate to a town church or to a chapel of ease where the mother church was just by," with an express reservation of the rights of the mother church. It is very clear also that St. Thomas's is not a parish church.

In that capacity, I do not think he had, in point of law, the right he claims; he only acted as "proxy for the rector," not as curate in ordinary to the parish of St. John's, though occasionally bound to do duty in St. John's church, but as curate of St. Thomas and its congregation, who form a portion of what is designated the parish of St. John's. His sphere of duty is confined chiefly, though not exclusively, to that church and congregation. He is a stipendiary curate, the Bishop having agreed to allow him a salary of £100 a year. I think the principal terms of the license confer greater powers on him than ordinary curates enjoy, but the reservation of the rights of the mother church, and the limitation to that of a curate to a chapel of ease, operate as a qualification of the terms, "collate," and the charge "with the cure of souls of the congregation, with the government of the said church." Curate, in its ordinary sense, signified a clerk not instituted to the cure of souls, but exercising the spiritual office under the rector or vicar,—*1 Il. Bl.*, 424. A chapel of ease, merely, is that which is built within the precinct of the parish church, and belongs to the parish church and the person of it. It is a mere oratory for the parishioners, in prayers and preaching, sacraments and burials being received and performed at the mother church, and commonly the curate is removable at the will of the parochial minister,—*Roger's Ecl. Law*, 143. Chapels of ease have like officers, for the most part, as churches have, distinguished only in manner, visitable by the ordinary,—*Id.* p. 144. As a matter of fact, it might be urged that St. Thomas's church partakes more of the character of a parochial chapel, which has the parochial rights of a christening and burying, but in the want of a rectory and endowment, and is generally maintained by a stipend from the parish priest, to whom all the rights and duties were entirely preserved,—*Id.* 143. Viewed either as a chapel of ease, or a parochial chapel, it cannot be said to have independent control in these matters which the law casts upon the mother church; the pew rents, for instance, are at the disposal of the ordinary, for we find him allocating a portion of them to the salary payable to Mr. Wood. With the concurrence of the ordinary, the plaintiff held the

clerk's pew for many years. In *Rogers 165*, it is said the ordinary has *prima facie* the disposing of all the seats in the church, that is, he possesses the power over them till a faculty be proved or presumed; the possession of a pew is said to be a sort of tenancy at will, good against all the world, in a defensive sense, except the churchwardens, as officers of the ordinary, but capable of being determined by them whenever the exigencies or convenience of the parish may require it,—*Id 168*.

Now the Bishop authorised the plaintiff to retain his seat in the clerk's pew, and his office as clerk, and the churchwardens, acting with the concurrence of the minister, forcibly eject him from the pew, after the minister had given him a notice of his having dismissed him from office. If the plaintiff was tenant at will of the pew to the Bishop, the churchwardens were not authorised by him to turn the plaintiff out, and they were wrong doers in ejecting him. In page 172 of the same work, it is said the churchwardens may remove persons originally placed in seats, &c., but if they do so capriciously, or without just ground, the ordinary will control and correct them.

Upon the whole case, which has been by no means devoid of difficulty, I am opinion that the Rev. Mr. Wood had not the power, in point of law, to dismiss the plaintiff from his office of clerk of St. Thomas's church, and consequently, that the defendants were not justified in turning him out of the clerk's pew. The rule ought therefore to be discharged.

HON. MR. JUSTICE ROBINSON :

As the matters now to be determined are dry questions of law, and it is moreover desirable to avoid the revival of angry feelings, I shall deal with the evidence in this cause as generally as shall be compatible with the perspicuity of my judgment; and now that the right to appoint and dismiss the clerk of St. Thomas's church is settled by the unanimous decision of the Court, I hope that a spirit of concord will take the place of those contentions which seem to have distracted and disparaged that church, and led to this litigation.

From this evidence it appears that the church of St. Thomas, in this town, was built by Archdeacon Wix, about the year 1836, on land which had been granted by the Crown to him "and his successors in the office of Archdeacon," for the purpose of erecting thereupon a Protestant Episcopal Church in connection with the United Church of England and Ireland.

At that time Newfoundland was included in the Diocese of Nova Scotia, and the Archdeacon was the chief ecclesiastical authority resident in the colony.

On the 1st January, 1838, Archdeacon Wix appointed the plaintiff to be the first clerk of St. Thomas's church, and the Archdeacon officiated as its first minister.

In 1839 this colony was separated from the See of Nova Scotia, and Dr. Spencer was appointed as first Bishop of Newfoundland. On the 15th of December, 1840, he issued, under the seal of the Diocese, an instrument to the following effect: "We give and grant to the said Henry Earle our license and authority to execute the office of clerk in our Church of St. Thomas, during our pleasure;" and from 1838 to 1859—upwards of twenty-one years—Earle continued, without other appointment or license, to act as clerk.

In 1847. Mr. Wix having assigned to the present Bishop, Dr. Feild. the land and Church of St. Thomas, his lordship surrendered to the Crown Wix's grant, and obtained a fresh grant to himself of the said land on which the Church had been erected, and in this grant are the words indicating the trust on which it is held "for the performance of divine worship according to the rites of the Church of England."

In 1853 a vacancy in the office of minister of the said church having occurred, by the death of the Rev. Chas. Blackman, the Lord Bishop appointed thereto the Rev. Mr. Wood by an instrument under the episcopal seal of the Diocese, bearing date the 15th October, 1853, which is as follows: "We do by these presents license and collate you to our Church of St. Thomas, and we do by these presents charge you, in the Lord, with the cure of the souls of the congregation, and with the government of the said church, saving always in all things the rights and privileges of the Cathedral and Mother Church of St. John the Baptist in the said town." I observe that the cure of souls here committed is not over any parish or district, but over "the congregation." For the purpose of shewing at the trial what was the reservation or saving referred to in the license, and the real position Mr. Wood occupied in relating to such Mother Church, a letter from Mr. Wood himself to the Bishop, dated in 1853, and written expressly on the subject of his appointment was offered and received in evidence, in which are the following expressions:

"As to the future settlement of St. Thomas's Church, it is not for me to judge." "I shall be happy to be engaged to serve

in the Church of St. Thomas, according to the settlement to be effected by the Bishop, as it will have to be received and understood by the vestry and congregation of that church." "I am not acquainted with what may be the precise position of a curate of a town church or chapel of ease where the Mother Church is just by, and the rector is enabled efficiently to attend to the general duties of his parish; but I wish to observe that, in obtaining the Bishop's license as curate of St. Thomas, and that by the rector's expressed wish and recommendation, if I understood aright, it will be expressly as curate of St. Thomas, and not curate in ordinary to the parish of St. John's." "Saint Thomas being restored to its proper foundation, dependent on the parish of St. John's, it is but for me cheerfully to give up all emoluments for that church to the mother church, such as fees, &c., &c." "I perfectly understand that the rector will have occasionally to officiate in St. Thomas, and that the curate thereof may be liable to be required to do duty in St. John's church, &c."

In 1859 a dispute arose between the plaintiff, on the one side, and Mr. Wood and the defendants, as churchwardens, on the other, the particulars or merits of which it is unnecessary for me now to notice; it resulted, however, in Mr. Wood informing the plaintiff, on 2nd Sept., 1859, "that his continuance in office depended upon him, and that he did not any longer require his attendance as clerk of St. Thomas church." The Lord Bishop was at that time on a visitation, and upon his return to St. John's, about the middle of October, Mr. Wood informed him that he (Mr. Wood) had dismissed Earle, prior to which communication the Bishop states he had had no complaint preferred to him against the clerk. The Bishop denied the authority of Mr. Wood to dismiss Earle, disapproved of the act as one of unnecessary and undeserved severity, expressed himself strongly upon the injustice of dismissing an officer (even supposing Mr. Wood had the authority to do so) without affording him a proper opportunity of defending or explaining his conduct, and advised Mr. Wood to adopt a more temperate and conciliatory course towards Earle in consideration of his long services in the church, adding that he was ready to hear and determine any complaint that might be preferred against the clerk. Mr. Wood and the churchwardens acted in concert; they did not think fit to follow the Bishop's advice, and questioned his authority in the matter; they persisted in considering Earle dismissed, and gave notice that if

he should resume the clerk's seat and office, he should be ejected by force. Accordingly, on Sunday, 6th Nov., 1859, in the presence of the congregation then assembled for morning service—Mr. Wood being in the reading desk and the seraphine playing at the commencement of divine worship—the defendants came to the clerk's seat, where the plaintiff was, robed in the accustomed manner and where he had sat since the church was built; they ordered him out; the plaintiff said he had authority of the Lord Bishop to keep that seat and place, and warned them against interfering with him in the discharge of his duty; he was, however, pulled by force out of the seat; and for that assault he has brought the present action.

The defendants justify the assault, upon the ground that the plaintiff was not then clerk, and therefore had no right to be in the clerk's seat; upon which fact the plaintiff takes issue, and the defendants rely, in support of their justification, upon the validity of Mr. Wood's dismissal of Earle on 2nd Sept.

The questions that arise under this issue of clerk or no clerk, under the foregoing circumstances, are, 1st: did Mr. Wood possess the legal authority to dismiss the plaintiff? and 2nd: if he did, was such authority properly exercised?

It is conceded on both sides that in this colony there are not, strictly by law, any parishes, and therefore no rectories, vicarages, or such like ecclesiastical estates as exist in England. What rights the Lord Bishop of the diocese takes over the churches in the colony, in connexion with the Church of England, by virtue of his episcopal office and of his patent, and what estates the several ministers appointed to officiate in their respective churches hold, are questions novel and difficult; they belong more to the functions of a civil lawyer than of a common law lawyer, and I should feel extreme diffidence in my determination of such questions; but the particular circumstances of St. Thomas's church divest the present of much of the difficulty attending the abstract question.

Whatever influence usage might exercise in determining the right to appoint or dismiss clerks in other churches, it can have none here, where Earle was the first clerk appointed to this church. The propriety of his appointment by Archdeacon Wix, and confirmation of that appointment by Bishop Spencer, does not seem to have been at any time disputed. The right of dismissal is usually contingent upon the right of appointment; and upon the best judgment I can form upon the gene-

ral principles of law that apply to the particular circumstances of St. Thomas's church, I am of opinion that the right of dismissing Mr. Earle was vested in that party, viz., the Lord Bishop; that the position which Mr. Wood occupied in the Church of St. Thomas, pursuant to his license and his own admissions, was that of Curate, which would not in England, and did not here, invest him with any authority to dismiss or appoint the clerk, and, therefore, that his dismissal of Earle was nugatory.

Such being my opinion, it becomes unnecessary for me to decide whether, if Mr. Wood had possessed the authority he claimed, he had properly exercised it in this case; but I entertain a strong opinion that the dismissal of any officer (not merely a parish clerk in England who was a freehold in his office, but any officer), from a situation which he had held for upwards of twenty years, without formally affording him the opportunity of defending or explaining his conduct, is repugnant to the first principles of natural justice, and would require very strong circumstances indeed to justify.

The interest which many take in the question now under consideration, and the ability and research with which it has been argued on both sides, entitle the parties concerned to know the reasons and authorities which govern my judgment in arriving at the conclusion above mentioned. In *3, B. E. L. 86*, it is laid down that "the parish clerk ought to be deprived by him who placed him in his office," and I think the analogy is applicable to the plaintiff, although not a *parish* clerk. It is not easy to conceive who ordinarily could have the power of dismissing from an office, except he who had the power of appointing.

The plaintiff was appointed by the chief ecclesiastical authority then in the colony—the Archdeacon, who is the representative of the Bishop, and in law is termed *oculus episcopi*; he also was owner in fee of the church with its appurtenances; he was the trustee charged with seeing that the services of the church are conducted according to the rites and ceremonies of the Church of England; and to perform the duties appertaining to the office of clerk in the church; such trustee appointed Earle. It has not been even suggested that any one else could legally or properly have appointed such officer; and the first Bishop confirmed the nomination of the Archdeacon by a formal episcopal instrument, and the present Bishop has acquiesced in it.

The present Bishop is the assignee of the laud, and is now owner in fee of the church, and trustee for the like purposes as was the Archdeacon, and I think in him alone is now vested the legal right to dismiss the clerk, even on those grounds, but his official authority supports that right. The office of Bishop, in relation to the government of a church avowedly in connection with the Established Church of England, is an element in the due consideration of this case which cannot properly be overlooked. That office is not one of mere dignity, nor does the law of England regard it solely in reference to the ministrations of religion—it possesses a legal status, which, at any rate, ministers and members of an episcopal church must be presumed to acknowledge and to be bound by to its legitimate extent. Now, by the common law, when England was, as we are now, without parishes, “the Bishop was the universal incumbent of every church in his diocese,”—(*Cripp*, 74); and by the canon law, whilst any one may build a house for the worship of God, none can erect a church without the license of the Bishop—(*3 Co. D.*, 609). And in England (where rectories do exist) it has been ruled that, even if the freehold were in the rector, “the Bishop’s authority in the church is not hindered,”—(*J. E. L.*, 362)

The question then remains: Has the Lord Bishop transferred to Mr. Wood the right of dismissing Earle, either by express terms or necessary implication? The language which has been used in the Bishop’s license to Mr. Wood has laid the ground for specious argument; whilst the words used by Mr. Wood in his letter to the Bishop, “parish record,” “curate,” “mother church,” helped, at the first blush, to confuse the matter.

The Attorney General contends, as I understand him, that the Bishop has by implication constituted Mr. Wood the incumbent of St. Thomas’s Church, because in his license he uses the word “collate”; and that, as the incumbent of a parish church in England has the right of appointing and dismissing the parish clerk, St. Thomas’s must be considered a parish church, with Mr. Wood its incumbent, and therefore enjoying the legal rights which in England would flow from such a position, one of which is that of dismissing the clerk. In the first place, it must be remembered that the doctrine of implication never arises except in the absence of express declarations by the parties to an agreement,—*1 Salk*, 226; and that, in this case, the license to Mr. Wood expressly excepts

from him, and saves to the mother church the rights and privileges of that church, whatever those are.

It is also a general rule in regard to this doctrine that "when an estate is sought to be raised by implication, it must be by necessary and inevitable inference, and such as that the words can have no other construction whatever."—*Talb. 3*.

An incumbent in its strict legal sense is defined to be "a clerk resident on his benefice with cure"; whilst a "benefice" is a "church preferment or dignity given for life, not for years or at will," (*Tom., L.D.*), and is a term "almost invariably appropriated to rectories, vicarages and other parochial preferments,"—*3 Lt. C., 26*. Now, as there are not admittedly in this colony any parishes, and, as at present advised, I do not believe the Lord Bishop possesses by law the power to constitute such with their consequential rights of tithes and other ecclesiastical dues, it seems to me impossible to suppose that, by the use of the word "collate," the Bishop must be presumed to have created and granted what, in point of law and of fact, he had not the power to create or grant.

The right of the Bishop to appoint to the office or dignity of Archdeacon is expressly vested in him by his patent from the Queen, who is the temporal head of the church and the fountain of honour; and it does not touch this case; besides, the word "collation" may have a construction other than that contended for by the Attorney General, although I admit that such is its usual meaning. I find in *Gibson's Codex, pp. 76 and 77*, precedents of the Bishop's collation to a grammar school, and of the patron's collation to a free school, and I therefore read this word in Mr. Wood's license in the sense in which it is used by Bishop Taylor—"to confer"—in which sense it would have operation in this case, whilst in the technical meaning applied to it by the Attorney General, it would have none. The Latin word from which collate is derived has no less than thirteen different meanings, and surely it would be a hazardous thing to determine the quantity or quality of an estate by the mere fact of a word of such multifarious signification having been used in a license.

It is not necessary to consider the question of pleading raised for the defendants from the use of the word "incumbent" in the plea, as they have fairly stated that they desire to have the judgment of the Court upon the legal right to appoint and dismiss the clerk, rather than upon technical points of pleading.

But whether there be or be not in Newfoundland, as a general rule, parishes, rectors, curates or mother church, Mr. Wood has, as regards this particular case, precluded himself by his own act; he has used these words in their analogy to England for the purpose of defining and designating the position he has to fill in St. Thomas's Church and the relation he was to bear to the cathedral or mother church, and it is not competent for him, after he has accepted an appointment under certain conditions expressed under his own hand, to ignore those conditions and claim different ones. I am willing to believe that he may have forgotten that letter, and that the churchwardens may not have known of its existence when they entered into this controversy.

On a review, therefore, of all the circumstances of this case, I think that Mr. Wood had no authority to dismiss Earle, and that there was not any misdirection. Neither do I think there is any doubt that the letter of Mr. Wood was properly received in evidence, as well to shew what were the rights saved in his license as to shew his real position with regard to the "mother church."

It must not be supposed that the clerk of St. Thomas's Church can misbehave himself with impunity; it is plain to me that if he should be guilty of any moral delinquency or neglect of duty, or if by rudeness and incivility of manner, or by contumacious disregard to the reasonable desire of the minister, he should render himself justly obnoxious, the Bishop, having the authority, would be bound, on a complaint being made, duly to investigate the charges and to afford redress, and such investigation would probably be conducted more dispassionately and satisfactorily by him than by parties who might be acting as judge in their own cause.

The verdict ought not to be disturbed and the rule should be discharged.

Mr. Pinsent for plaintiff.

Attorney General (Hoyles) and *Mr. Carter, Q. C.*, for defendants.

1861, *January*. HON. SIR F. BRADY, C. J.

Shipping—Salvage—Costs, Marshal's fees.

Where, on taxation of the Marshal's fees in Admiralty, the Registrar allowed him a commission of three per cent. upon the sale of the vessel and property, the Court reduced the amount to two and one-half per cent., and further held that there was nothing to prevent parties in future from moving that the sale be executed by any other person, if conducive to the interests of all parties.

IN the matter of the fees of the marshal of the court in this case, Mr. Pinsent for the marshal, James Bayly, Esq., Mr Carter for the owners, and the Attorney General for the Crown, opposing. The vessel had been taken by the Court as a derelict, the claim of the owners being subsequently admitted, subject to salvage claims. The registrar had allowed the marshal on taxation commission upon the sale of the vessel and cargo at three per cent., and for loss of time and travelling expenses to St. Mary's, 110 miles, to execute warrant of arrest of ship and cargo, a sum proportionate to the mileage allowed for by the scale of fees, and various actual disbursements to shipkeepers for their hire and board for the safe custody of the vessel in assisting the marshal; also for his several attendances on the court during the progress of the suit. These several charges were objected to; the first upon the ground that no commission upon the sale was payable where the marshal executed the same himself—that it could only be allowed as a disbursement; the second, on the ground that there was nothing in the rules to justify a *pro rata* charge; the charge for disbursements for safe custody, upon the ground that such expenses were included in the marshal's fee for keeping possession; the fees for attendances, on the ground that it was only in the case of a passing of a sentence or decree that such fee was allowable.

Mr. Pinsent contra.

The Court allowed commission at the rate of two and a-half per cent., observing that there was nothing to prevent parties in any future case from moving that the sale be executed by any other person, if more conducive to the interests of the parties concerned. As to the more than ordinary trouble and time expended in proceeding so long a distance as St. Mary's, a charge in the nature of *quantum meruit* of £15 15s. allowed; charge for shipkeepers allowed as reasonable under the circumstances; attendances disallowed, as there had been no sentence or decree under the meaning of the rule. Charges allowed in British sterling.

1861, January. BY THE COURT.

Insolvency—Costs to which creditors who have attached are entitled.

Creditors who have proceeded by attachment up to the date of the declaration of insolvency are entitled to be allowed out of the estate their costs, but not the subsequent costs of proving their debts before the master.

THE court held that the case of creditors who had proceeded by attachment up to the declaration of insolvency should be allowed out of the estate, but not the subsequent costs of proving their debts before the master, &c. There was no statutable provision for such an allowance; the rule hitherto observed was therefore the sound and proper one.

Mr. Flood and Mr. Hayward for the applicants.

DEARIN v. COYELL.

1861. BY THE COURT.

*Party wall—Proportion of cost to be borne by each party owning wall—
Saint John's Rebuilding Act.*

In an action for the recovery of half the cost of erecting a party wall, the judge told the jury to return a verdict for half the amount which they considered had been expended in the erection of the wall.

THIS was an action brought for the recovery of the sum of £75 2s. 6d., being half the alleged value of a party wall erected by plaintiffs.

By the plaintiff's case it appeared that they were tenants under Mr. Robert Prowse, administrator of W. E. Taylor, of a piece of land situate on the south side of Water street—Mr. Prowse, as administrator, owned also the adjoining lands, and at the time of leasing to the plaintiffs directed them to erect a party wall fourteen inches thick, half on either land, which plaintiffs did; subsequently the defendant leased the adjoining land from Mr. Prowse and builds a house on it, making use of the party wall. The plaintiffs called several witnesses to prove these facts, and also as to the value.

The defendant admitted that he owed something to the plaintiffs, but that they were not required to erect a wall four-

teen inches, or any particular thickness; that they had unnecessarily built this to suit their own purpose, while a wall of nine inches in thickness would have been adequate; that the plaintiffs were not entitled to be paid for one half of the old wall, inasmuch as there existed at the time of the plaintiffs' leasing a portion of our old wall which plaintiffs had continued; that the defendant had supplied some of the material for the wall. There were many witnesses for the defence.

The Court charged the jury, and directed them to find a verdict for half the amount, which they considered upon the whole of the evidence the plaintiffs had actually expended in the building of the wall.

The jury found a verdict for £50 currency.

Mr. Whiteway for plaintiff.

Mr. Hoyles, Q. C., for defendant.

NOEL v. WARREN.

1861, January. HON. MR. JUSTICE LITTLE.

Trover—Seals panned on the ice fields—Reducing into possession—Abandonment.

If a party leave seals scattered about on the ice fields without any reasonable hope of recovering them, and they are taken by another party, the original owner has no remedy against the party so taking the seals.

THIS was an action of trover to recover the value of two hundred seal pelts said to have been taken from the plaintiff by defendant and his crew at the ice in the spring of 1858.

There were several witnesses called on both sides.

Mr. Justice Little charged the jury that if a party had killed, marked, sculpted and piled, or done such acts as to establish ownership in the seals, and had not abandoned them, any person taking them would be liable in this action; but, if he left them scattered about without a reasonable hope of recovery, it would not be so. Here the plaintiff says he killed seals, sculpted some, and placed others in a round state, piled in a circuit of a mile or a half a mile, in number more than two hundred, and that if let alone, they could have been got on board; and he says that the plaintiff took part of them. If the witnesses for the plaintiff had deposed to that which was

true, in his mind the plaintiff had established a right to recover at least to the value of ten seals, which they say the defendant admitted to be on board his vessel. If the evidence for the plaintiff in this particular was not believed, then his case was materially shaken. The defence is that they had on board only thirty of the quality of seals described as having been taken, and these were, with the exception of ten, killed by the defendant's crew—and these ten found scattered on the ice and taken in a circuit of ten or fifteen miles. The defendant also denies that he admitted that those ten were the seals of the plaintiff and had the plaintiff's mark; he and his witnesses say that when the plaintiff's crew came on board he said if they were the plaintiff's seals to take them, and that the plaintiff's crew, having looked at them, said they were not the seals they were looking for; one of the defendant's witnesses says that he was one of those who took one of the round seals—it would have been satisfactory if all the men who took those ten seals were produced. As to the conversation between the parties in which the plaintiff proposed a settlement, they had better put that conversation aside, and ask themselves had the plaintiff made out a case; if so, to find for him to the extent of that case; if not, to find for defendant.

Verdict for plaintiff, £10.

Mr. F. B. T. Carter, Q. C., and Hon. Mr. Pinsent for plaintiff.

Mr. Hoyles, Q. C., for defendant.

DOE DEM HUNT, ADMR HUNT, v. ANDREWS.

1861, *January*. BY THE COURT.

Practice—Motion for stay of judgment—Motion to postpone—Want of evidence when it may be ground to support a motion to postpone.

On an appointment for a rule for stay of judgment on the grounds that certain papers of importance to the defendant were at a distance from the Court, the Judge trying the case refused the rule holding that want of evidence should have been the ground for a motion to postpone.

THIS case was tried in 1857 at Greenspond. There was then a verdict for the plaintiff, subject to a rule for judgment of non-suit, if the Court should be of opinion that the plaintiff

had no case. This rule was argued at Bonavista and made absolute. The plaintiff in person now brings his case for trial. The Hon. G. H. Emerson appeared for defendant. A petty jury were summoned, and plaintiff stated his case and was examined by the Court. It appeared from his statement, on oath, that his father, Hunt, died about twenty-two years ago; father was in possession of the room in question for many years before he died; the room is situate at Cape Island, Cape Freels; there was a dwelling-house and store on the place at that time built by his father; after father's death, mother was in possession and lived on the room two years; she died two years after him; her children lived with her; after that plaintiff's uncle occupied the house, and then Andrews got possession of the room; plaintiff is thirty years old—eldest of the family living; don't know when defendant, Andrews, got into possession of place; father's room is worth one hundred pounds, or five pounds a year; defendant had built a house on it; saw him build it; did not tell him not to build the house; never made any demand before he came to the law in this action now pending; defendant said his (plaintiff's) father was in debt £15, and he bought it from Mr. Highmore for that debt; does not know whether Andrews had anything to do with debt or not.

Thomas Mellendey, sworn—Plaintiff's father occupied room in question thirty-five years ago; he died about twenty-two years ago; Hunt built stage, flake and store while he was alive; defendant lived on the other part; when they came on the room first they (plaintiff's father and Andrews) were partners; cannot tell how long they continued in partnership; it was some years before Hunt's death they parted; after they parted Hunt lived on his own part; Andrews is now in possession of the whole that Hunt had when he died; thirteen years after they parted the father died; all I know is that Hunt occupied the place a long time before he died; John Ford had possession of it; he sold it to Hunt; I drew the deed. Counsel for defendant here submitted that the deed ought to be produced by plaintiff.

The Court did not consider that title deed need be produced at this stage of the cause, if the contents of it were not sought to be proved—possession was sufficient against a wrongdoer.

Witness had been living forty years at Cape Freels; Mr. Ford occupied it before he sold it to Hunt; did not see any money paid down when it was bought from Ford; the property is of more value now than when Hunt bought it; the dwelling.

house built by Hunt on the room was a comfortable family dwelling house, studded and clapboarded; Richard Osmond Hunt possessed western half of the whole room; Andrews the eastern; Hunt built a store and flake on his part; he was living on that part, Andrews on the other part; after Hunt died his wife occupied it; she lived a few years on it; the house Ford had was an old sodded house; I lived on the island forty years; my father was the first man that lived on the island.

This closed the verbal evidence for the plaintiff, and the letters of administration to the estate of Hunt, granted by the Supreme Court of Newfoundland to the plaintiff, were then put in.

Defendant's counsel then being called upon to address the jury, said that before going to the jury he would return to the points urged by him before. The learned counsel then restated the points before referred to, which His Lordship overruled.

The Court thought counsel should go to the jury. Mr. Emerson, Q. C., then addressed the jury, and called no witnesses; after which His Lordship charged them and said that the only fact they had to find was whether the plaintiff was entitled to the premises or not. In deciding the question of property in Hunt they must be satisfied that his father died in possession of it as owner, whether by occupation or purchase was a matter of indifference. The learned counsel had done and said all that he could for his client, and, amongst other matters, urged that the place had been abandoned by Hunt's family. A child has no power to abandon a right. Plaintiff was an infant, and did not possess the power of abandoning it. When he became administrator in 1856, then he could abandon his father's property. The evidence that Hunt's father died in possession of the property—that possession went as far back as thirty-five years ago; that Hunt died twenty-two years ago, and this action was commenced three years ago. Another witness confirmed that. Another proved that old Hunt built a clapboarded house and store on the premises. Such was the evidence upon which they were to decide the case. Was the property old Hunt's at the time of his death? If so, the letters of administration put in gave plaintiff a right to sue, and if they were satisfied of all this they were bound to find a verdict for the plaintiff. The plaintiff must establish his claim, not by the weakness of the defendant's title, but by the strength of his own.

The jury then retired, and after a short time they found a verdict for the plaintiff—6d. damages. Defendant's counsel then applied for a rule for stay of judgment, to be argued before the judge in St. John's, on grounds that Mr. Flood had been defendant's attorney, and had his papers, some of which might be important; he had no affidavit.

The Court refused rule for stay of judgment, stating that want of evidence should have been the ground for a motion to postpone.

MILLAR v. WHELAN, ADMR.

1861, *January*. HON. MR. JUSTICE ROBINSON.

Contract—Breach—Statute of Frauds, memo in writing—What is a sufficient memorandum.

It is not necessary that the agreement which the provisions of the Statute of Frauds requires to be in writing, should be in any particular form or appear in any single paper. It may be gathered from several connected papers.

THIS action was brought against the defendant as administratrix of her deceased husband, John Whelan, to recover damages for breach of contract in not accepting a cargo of timber ordered by deceased in 1854, and provided by the plaintiff accordingly.

The jury found a verdict for plaintiff for £53 5s. 6d.

The attorney general obtained a rule to set aside that verdict and enter a nonsuit, on the ground that there was not any sufficient contract in writing to satisfy the statute of frauds.

We think, however, that the evidence did establish the existence of a written agreement between the deceased and Millar sufficient to support the declaration and the verdict, and to comply with the statute.

It is not necessary that the agreement should be in any particular form, or appear in any single paper, it may be collected from several connected papers.—*Kennedy vs. Lee, 3 Mer. 441.*

In this case the deceased furnished to the plaintiff in the autumn of 1854, a written specification of the timber required, and demanded of him if he could and would supply it by the 29th of the following June. The plaintiff, who resided at Sydney, C. B., wrote to the deceased in December of the same year, that he would supply the timber according to specification, and

have it ready when called for; to this the deceased replied on the 29th December, 1854, to latter, that he had received plaintiff's letter, hoped that all would be ready, and would go for the timber on his return from the ice, and on the 1st March, 1855, deceased again wrote to plaintiff, referred to his last letter, and told him that his voyage for the timber would be his first when he returned from sealing. Accordingly, after the sealing voyage, deceased went to Sydney; he there met the plaintiff, saw the timber plaintiff had provided under the specification, approved of it, and said he would come back for it in four weeks: he never came or sent for it, and shortly afterwards died.

These letters and specification appears to us to be sufficiently specific and connected to constitute a valid contract, and the property referred to therein is sufficiently identified as it may be by extrinsic evidence.—*Bleakly v. Smith*, 11 Sim. 150,

The want of a price being named is not a deficiency which will prevent the existence of an agreement, as a reasonable price will be presumed to be intended.—*Hoadley v. McLaine*, 10 Binx. 482; *Valpy v. Gibson*, 4 C. B. 8.

The *postea* must be delivered to the plaintiff, and this rule discharged.

Mr. Pinsent for plaintiff.

Attorney General for defendant.

EMBERLEY v. BENNETT,

1861, January. HON. MR. JUSTICE LITTLE.

Master and servant—Desertion—Harboring servants—Notice—Knowledge by party harboring—Damages—Trespass.

In an action for enticing away and harboring fishery servants, the proper form of action is trespass on the case, as the damages sought to be recovered are of a consequential character.

THIS was an action of trespass on the case, damages laid at £200.

It appeared from the evidence given by the plaintiff, that in the spring of the year 1856 he had regularly shipped two servants to serve him in the capacity of fishermen at Brulee, in

Placentia Bay; that said servants entered into his service and continued therein for five days when they left and went to the house of defendant, whose fishing room is immediately opposite that of plaintiffs; that they continued in defendant's service to the end of the then voyage; that on their so deserting he applied to the magistrate at Harbor Buffett and obtained a notice on defendant; that plaintiff could not read nor write, (the Court refused to admit any evidence of the notice, no copy having been kept by plaintiff); that he, the plaintiff, sent said paper or notice to defendant, whose son came to plaintiff, who then informed him of the desertion of his servants, and desired him not to harbor or employ them; that defendant's son was also his master of voyage and acted as his agent; that defendant still continued to employ them and plaintiff lost their services, and his voyage, in consequence thereof, was broken up; that defendant could not avoid seeing said servants in plaintiff's employ, and he saw plaintiff bring them from St. John's.

On the cross-examination by defendant's counsel, it appeared that a dispute arose as to the terms of their shipping paper, defendant having stated to his servants that he might claim one half a man's share for his cod seine; that this was said by way of a joke, he having no intention of deviating from his agreement in which nothing was stated as to such share; but that the servants insisted on having a new agreement.

Thomas E. Collett, Esq., magistrate, proved that plaintiff had applied to him about his servants; that he gave plaintiff notices on defendant and one to post up, but did not keep copies thereof, the servants did not apply to him.

The defendant's counsel moved that plaintiff be non-suited on the grounds that the action ought to have been trespass; that no evidence had been given of a knowledge on the part of the defendant that the servants were plaintiff's; no proof of any notice on defendant cautioning him against employing said servants, citing in support of the points *Ch. on Plea, 126, 2 New Rep., 476, 2 Ch. Rep., 495.*

Plaintiff's counsel submitted that these objections did not lay, the case being transferred to this Court should be governed solely by the rules and practice thereof; that case was the proper form of action as the injury was consequential, and that there was sufficient evidence to go to the jury of defendant's knowledge of these being plaintiff's shipped servants.

The judge stated that these points would be reserved; that the first was contrary to his previous impression; that the form of action was a correct one, and that there was sufficient evidence for the case to go to the jury.

Defendant's counsel then addressed the jury.

The evidence for the defence having been taken *de bene esse* at St. John's, was then read. It appeared that a dispute had arisen between plaintiff and his servants, plaintiff requiring them to allow him a share for the cod seine, and on their refusing to do so, he desired them to go; and that they left in consequence of his refusing to give them a new shipping paper.

Plaintiff's counsel then replied.

The judge charged the jury and revised the evidence, and stated that if they were satisfied from the evidence that defendant employed the plaintiff's servants with a knowledge of their being shipped to him for the voyage, and continued to harbor them after he had received notice not to do so, they should find for the plaintiff such damages as he had sustained by reason of the defendant's conduct. If on the other hand they believed the defendant had employed them in ignorance of their agreement to serve the plaintiff, and without notice of their having deserted plaintiff's service, or if the plaintiff had discharged them in the manner one of the servants had attested, they would find for defendant. If plaintiff casually stated that he would claim a share for the cod seine, still it could be no justification for their desertion, he was not entitled under the agreement to any share for the same, and the servants would have been protected against any such claim if they had continued in his service.

The jury then retired, and after an hour's absence returned a verdict of £40 for plaintiff.

Mr. J. I. Little for plaintiff.

Attorney General for defendant.

1861, January. BRADY, C. J. ; LITTLE, J. ; ROBINSON, J.

Insolvency—Receiver of voyage—Insolvency Act 19th Vic., cap. 16—Servant of supplier of bait, how far a privileged creditor—Insolvency of master—Meaning of the word “fish.”

Under the provisions of the Insolvency Act 19 Victoria, cap. 14, the servant of the bait supplier is not entitled to a preferable security for his wages. The bait master himself is only protected because he is expressly named in the statute. Bait happening to be fish does not therefore come under the general term “fish” as used in the Act.

HON. SIR F. BRADY :

It was not my intention to have done anything more in this case than express my concurrence in the judgment pronounced by Judge Robinson and in the grounds upon which he rested the conclusion at which he arrived, and also to express my regret that I should differ from the opinion of my brother, Judge Little, because I thought, in a meritorious point of view, the servants of the bait-master might be just as well entitled to such preferential claim against an insolvent estate as is given to all servants engaged “in the catching, curing or making of fish or oil.” I own I thought the language which we had to interpret was so plain, and I repeat, with the gravest sincerity, that I think so still, that no doubt could arise upon the true construction of it, but when we remember that my brother, Judge Little, was a party to the framing of this enactment, and how difficult it is to divest ourselves of preconceived impressions, and bring our minds to that even and unprejudiced temper which enables one to judge calmly and dispassionately as to the true import and effect of the language employed, we may well feel, and I say this with great respect, that such impressions may in this case have caused the difference of opinion which exists among the judges. The language of an Act of Parliament is, in general, to be read by this Court as we read the language of every private deed, in its plain and ordinary meaning, and it is our duty to discover from it, and from it alone, because outside either document we cannot go, the intention of the legislature in the one instance, and of the parties in the other. Nor can we, if we believe their intention was to do something which the language they have used does not extend to, by interpretation extend that language to what was omitted or overlooked, because we would be, in doing so, exceeding our legal position, as mere expounders of the law,

and usurping the authority of our law makers, the Governor, Legislative Council and House of Assembly. The language we have to interpret or construe in this case is contained in the first section of the 19th Victoria, cap. 14, and is as follows: "When it shall be made to appear that the hirer or employer of any seaman, fisherman, or other servant, is insolvent, and unable to pay his creditors twenty shillings in the pound, such seaman, fisherman, or other servant, actually employed in the catching, curing or making of fish or oil, and such person as shall have supplied bait to the hirer or employer aforesaid, and who shall be creditors for wages, share or bait, for the current season, shall upon all such fish and oil taken, cured or made by the hirer or employer aforesaid or out of the produce or value thereof if the same be in the possession of the hirer or employer, or any other person aware of or privy to the hiring or employing of any such seaman, fisherman or other servant, or having notice of the claim of such seaman, fisherman or other servant, whether the same be accruing or due, at or before the time of such other person receiving such fish or oil, or the produce or value thereof, or before paying the hirer or employer for the same, be considered privileged creditors and shall first be paid twenty shillings in the pound, so far as such fish and oil or the produce or value thereof shall go." The bait-master in this case became insolvent, and his servants now claim to have a right, under this section, to be paid their wages in full out of the money he earned as bait-master before any other creditor of his could make any claim to this portion of his property. It is now an universal rule, that in case of insolvency, all the creditors of the insolvent rank in equal degree on the property of the insolvent, unless those who are mortgagees or those who claim a legal priority by reason of some other like specified lien, upon all or some portion of the insolvent's property as entitles them to a prior payment as against the general creditors. When therefore a class claim an extraordinary privilege, as in this case, to be paid in full their claims out of the property of the insolvent in preference and priority to the shares which the general body of the insolvent's creditors claim out of the deficient estate, it is not too much to say, that before a Court of Justice establishes the validity of such a claim or other privilege, their right to it should be shewn to be clear and unquestionable. In my judgment the language of this section not only does not include the servants employed by the bait-master, but in truth it amounts to an express exclusion of

them from the benefit of this enactment. If I wanted evidence of that fact I would not go farther than the elaborate judgment of my brother judge. Can it be said that the bait-master is a person "actually employed in the catching, curing or making of fish or oil," if even the Legislature thought so why did they add to these words "or such person as shall have supplied bait to, &c." And if the bait-master would not be entitled to this preferential claim, were it not for the express language used in reference to him, how can his servants sustain a claim for such a preference where they are not named, but are in effect expressly excluded from this enactment.

The very language of the Act, when it speaks of the person who shall supply bait, distinguished him and those employed under him from the servants engaged in the "catching, curing, or making fish or oil," and when it expressly extends the privilege and preferential right to the bait-master, it thereby excludes his servants on the well known rule of construing documents *expressio unius est exclusio alterius*. I really should not have labored this question, but from all I heard upon the subject of an equitable construction of statutes, as bearing upon this case from my brother judge, and I will merely observe that as a general principle, I hold that that doctrine ought to be cautiously resorted to by Courts of Justice, because when countenanced or adopted it tends to substitute for the law of the Legislature the worst of all law, "judge-made law." I will merely cite a paragraph or two from the treatise of Mr. Dwarris, upon whose authority my learned brother has so largely rested his opinion in this case. Thus in Dwarris on statutes, 703, that able writer says: "The fittest course in all cases where the intention of the Legislature is brought into question, is to adhere to the words of the statute, construing them according to their nature and import, in the order in which they stand in the Act of Parliament. The most enlightened and experienced judges have for some time lamented the too frequent departure from the plain and obvious meaning of the words of the Act of Parliament by which the case is governed, and themselves hold it much the safer course to adhere to the words of the statute construed in their ordinary import than to any inquiry as to the supposed intention of the parties who framed the Act. They are not (as the most learned members of a learned body best know) to presume the intention of the Legislature, but to collect them from the words of the Act of Parliament; and they have nothing to do with the

policy of the law. This is the true sense in which it is so often impressively repeated, that judges are not to be encouraged to direct their conduct by the crooked cord of discretion but by the golden metwand of the law, i. e., not to construe statutes by equity, but to collect the sense of the legislature by a sound interpretation of its language, according to reason and grammatical correctness."

Upon these grounds, I am of opinion that judgment should be given for the defendant. Judgment accordingly.

HON. MR. JUSTICE LITTLE:

This is a summary action, brought by the plaintiff against the defendant for £8 17s., being the balance of wages due to the plaintiff as a supplied servant, at the fishery last summer, of one William Thorne, a planter of the defendants, and which sum is claimed from the defendant as the receiver of Thorne's voyage, the latter being insolvent and unable to pay the wages. It appears that the plaintiff was shipped to Thorne in the defendant's office, in the usual way; that he served as a hand in Thorne's bait skiff for the time agreed upon; that Thorne's fishery, in which the plaintiff was engaged, was the catching and supplying of bait, that is to say, herring and caplin, to various planters of the defendant and others; that a portion of the proceeds of this voyage, the money realized by the sale and supply of the herring and caplin, amounting to about £90, was paid to the defendant, and received by him with a full knowledge of the plaintiff's claim for wages; and Thorne being insolvent, the plaintiff claims to be paid his balance by the defendant under the local Act for the amendment of the Insolvency Law, 19 Victoria, cap. 14.

To settle the various questions raised on this important subject, the fishing servants' right to follow the voyage for their wages, the 19 Victoria, cap. 14, was passed by the Legislature. It has relation not only to seamen and fishermen but also to clerks and servants of every description; and while it secures to the fishing class of servants and sharemen the right to follow the voyage, or any part of it, or the produce or value thereof, into the hands of the receiver for the payment of their wages or shares, in the event of the insolvency of their hirers, such receiver having notice of their claim, it likewise secures to the general servants a prior claim on the insolvent estates

of their employers for their last year's wages. In fact, its provisions extend to all kinds of claims upon insolvent hirers and insolvent estates, defining their order of priority, and affording summary means of enforcing such demands as the present.

By the first section it is enacted that when it shall be made to appear that "the hirer or employer of any seaman, fisherman or other servant actually employed in the catching, curing, or making of fish or oil, is insolvent, such seaman, fisherman or other servant, and such person as shall have supplied bait to the hirer employer, and who shall be creditors for wages, shares, or bait for the current season, shall, upon such fish and oil taken, cured or made by the hirer or employer, or out of the produce or value thereof, in the hands of any person aware of or privy to the hiring, or having notice of the claim, whether the same be accruing or due at or before the receipt of the fish or oil, or the produce or value thereof, or before paying for the same, be considered privileged creditors, and shall first be paid twenty shillings in the pound, so far as such fish and oil or the produce or value thereof shall go."

The third section then prescribes the mode of proceeding by the servant or supplier of bait, before any court or justice of the peace, against the receiver, without any formal declaration of the insolvency of the hirer or employer. The fourth section enables the receiver to make any defence to the claim which would be available to the hirer if the action had been taken against him; and provides that he shall not be liable unless it be proven on the trial that the receiver was aware of or privy to the hiring, or had notice of the claim for wages, shares, or bait money at any time before or at the time of receiving "the fish and oil or a part thereof, or the proceeds of the same," or before payment therefor, and states that then he should only be liable to the extent of the voyage, or part, or produce, or value thereof received by him."

Now, it appears to me that the simple question we have to determine in this case is this: Was the plaintiff "a seaman, fisherman or other servant employed in catching, curing or making fish or oil?" In other words, was he a servant engaged in the fishery? I think there can be no doubt about that. In my judgment he was as much a fishery servant, and as actually engaged in catching fish while employed in his hirer's bait skiff catching herring or caplin, as if he had been catching cod-fish. The Act makes no distinction as to the kinds of fish which the servant may be employed in catching. The general

term "fish" comprises all kinds of fish. As to any usage with local insurance companies, confining the term "fish" to dry cod-fish, when mentioned under certain circumstances in policy of insurance, we have no evidence of any usage in this case; and even if we had, that would not affect the clear terms of an Act of the Legislature, which must be interpreted according to the true intent and meaning of the language used; and the well known and established acceptation of the general term "fish," as understood in the English language, is that by which we should be governed in reading this Act.

In *Dwarris on Statutes*, page 573, it is said that the words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use; for *jus et norma loquendi* is governed by usage, and the meaning of words spoken or written ought to be allowed as it has constantly been taken—*loquendum est vulgus*. But if the usage have been to construe the words of a statute contrary to their obvious meaning, by the vulgar tongue and the common acceptation of terms, such usage is not to be regarded, it being, say the books, an oppression of those concerned (to force upon them a conventional meaning) than a construction of the statute; and though where the words of the statute are doubtful, general usage may be called in to explain them, for *optimus legem interpres est consuetudo*—usages that can control an Act of Parliament must be universal and not the usage of any particular place.—1 *S. R.* 728. And Chief Justice Best says that the intent of the Legislature is not to be collected from any particular expression, but from a general view of the whole Act of Parliament.—4 *Bing*, 196.

In construing this Act, it is right to refer to previous Acts in any way relating to the same subject, for it is an established rule that all acts in *pari materia* are to be taken together as if they were one law, and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system and having one object in view.—*Dwarris*, 569; 4 *S. R.* 447. We who have read the old returns made to the Imperial Government of the trade of this colony, which were published by order of Parliament, know that the fisheries of this colony were not confined exclusively to codfish, but that salmon also to a large extent, and herring also, formed considerable items in the exports of the colony. The 15 Geo. III., cap. 31, was an act for the encouragement of the fisheries, and how can it be said that the term "fish" used in the sixteenth

section, and in other old fishery Acts, as well as in the 25th section of the Judicature Act, is confined to codfish?

In 1841 the local Legislature passed an Act "to regulate the packing and inspection of pickled fish for exportation from this colony," some sections of which detail the mode of sorting, weighing, salting and packing fish in barrels. It surely could not be contended that this refers to codfish, for the Act in other sections specifies different kinds of fish, such particularly as herring and salmon, and in an amendment to this Act passed in 1845, a duty of three shillings per cwt. is imposed on the exportation of fresh and salted or pickled herring and caplin in bulk.

It must be evident that the supply of bait is of the first moment in the prosecution of the fisheries. Without it, what security would the merchant have for his supplies? Without the employment of servants in the bait-skiff, there would be no use in employing servants in the hook-and-line cod-fishery. The 8th section of the Act under consideration gives to the supplying merchant a preference for supplies furnished for the fishery in the distribution of the insolvent estate of planters or persons engaged in the fishery, subject to the prior claims of the servants. Can it be contended that the merchant who supplies a bait-skiff owner like Thorne, would not have a prior claim on his insolvent estate for such supplies in the terms of this section? Then, if the supplier be protected in this way, as I think he undoubtedly is, it would seem very unreasonable that the servant should be excluded from the benefit of the act, which is remedial in its operation, and should, therefore, as urged in argument, be construed liberally. In *Dwarris*, 641, it is said, "A remedial act should be so construed as most effectually to meet the end in view and to prevent a failure of the remedy. As a general rule a remedial statute ought to be construed liberally. Thus a statute may be extended by construction to other cases within the same mischief and occasion of the act, though not expressly with their words." The statute 9 Richard 2nd, C. 3, gives writ of error to him in reversion. It was resolved in *Winchester's case*, 3 Rep. 4, that although the statute speaks only of reversions, yet remainders are also taken to be within the purview thereof. Again, in *Dwarris*, page 617, "A remedial statute will be extended by equity to other persons besides those expressly named,"—*Porter's case*, 1 Rep. 25; upon which doctrine the following observations were made in *Platt's case*, Plow, 36: It is not unusual in Acts of Parliament, espe-

cially in the more ancient ones, to comprehend by construction a generality where express mention is made only of a particular, the particular instances being taken only as examples of all that want redress in the kind whereof the mention is made. Thus the Act 1 *Richard 2, c. 12*, orders that the wardens of the Fleet shall not permit prisoners in execution to go out of the prison by bail or baston, "yet it has been adjudged that this Act extends to all gaolers."—in page 557. A thing which is within the object, spirit and meaning of a statute, is as much within the statute as if it were within the letter.—*Plow, 336, Rep. 101*.

While the Insolvency Act in question includes all "seamen, fishermen and other servants engaged in catching and curing fish," surely under these authorities it would not be going too far, if it were necessary, to resort to an equitable construction of its provisions, in such a case as the present, to admit that a fisherman or servant engaged in fishing for bait is within the object, spirit and meaning of the statute, and being within the mischief sought to be corrected is therefore within the remedy provided. In *Boutin's insolvency* we have held in this court that a servant, who was a store-keeper and occasionally employed about fish—herring and cod-fish,—was a privileged creditor upon the produce thereof for his wages. In *Rennie's insolvency* Mr. Archibald states in his note to the provisions of the Judicature Act relating to menial or domestic servants, that "the Courts have given the section a liberal construction where it has appeared that the party performed menial or domestic service, although generally employed in another capacity, and that rent of a fishing room was allowed to rank as supplies for the fishery as a prior claim. I think, however, that a fair and common sense interpretation of the present act will comprise the plaintiff's claim, without reference to that equitable and liberal construction contended for, and usually given to such acts, according to the authorities cited.

It seems that the provision securing to the person who shall have supplied bait an equal right with the fishing servant to follow the voyage of each person to whom he supplies bait, on the proceeds in the hands of the receiver for the payment of his bait money, has created in the minds of my brother judges an impression that while the bait-skiff owner is included, his servants are excluded from the benefit of the Act. Now, I should regard his claim, without this special provision, in precisely the same light as that of a planter, who sells a quantity of fish to A. B., and is left to the common law remedy, the same as any

other vendor, in fact, for the recovery of the price. The planter, in such a case, has no prior claim over any person, in the event of the insolvency of the purchaser. The bait supplier, however, is so important a person in carrying on the fishery, that it was deemed expedient by the Legislature to place his claim for bait supplied for the prosecution of the fishery upon the same footing as that of the fisherman's wages. He is enabled to follow the voyage caught by the persons to whom he supplied bait, for the price thereof; but his servants, who are not less important than himself, if not more so, in the prosecution of the voyage, are only able to follow their voyage or any part of it, or the proceeds, produce, or value thereof; that is, in this case, the money received by the defendant for the herring and caplin caught by them and their employer and supplied by him to the defendant's planters. If that money be not the "proceeds, value or produce" of the fish caught by the plaintiff and his brother servants, I should be at a loss to know what else it is, according to the first and fourth sections, which latter section is somewhat more comprehensive in its language than the other, for the receiver is thereby made liable for the servant's wages, to the extent of the voyage, or part, or produce, or value thereof received by him.

I have thought it proper, differing as I do from the conclusion formed by my brother judges, to be thus particular in the expression of my opinion upon this matter; for although the amount at stake in this case is small, yet the principle, viewed in a practical light, involved in the decision, is of considerable importance to those engaged in the fisheries of the colony.

I can only say that I have given the Act in question much consideration, not only on this but on previous occasions. Perhaps, unknown to myself, I take a view yet based somewhat on preconceived opinions, as to the operation of its provisions. But I have endeavored to weigh the subject strictly and impartially, as I feel I have done, according to the best of my judgment apart from any such opinions; and in concluding that the plaintiff has a legal right to recover, I have been guided by the language of the Act as I interpret it, and not simply by the policy it indicates, with a single desire that I am sure influences each member of this court to administer justice according to law.

HON MR. JUSTICE ROBINSON:

The plaintiff was a servant during the past summer to one Thorne, who was a supplier of bait, and the defendant received some money due to Thorne for such bait, which he placed to the credit of his own account with Thorne. By virtue of such receipt the plaintiff claims the right of holding the defendant liable for plaintiff's wages. Between the plaintiff and the defendant there is no privity of contract, and the liability of the defendant to pay Thorne's debt can only arise, if at all, under the provisions of the Insolvent Act, 19 Victoria, cap. 14.

The first section enacts that when it shall be made to appear that the hirer or employer of any seaman, fisherman or other servant actually employed in the catching, curing or making of fish or oil, and such person as shall have supplied bait to such hirer or employer shall upon all such fish or oil taken, cured or made by such hirer or employer, or out of the produce or value thereof, be considered privileged creditors and be paid twenty shillings in the pound, so far as such fish and oil or the produce or value thereof shall go.

The second section provides the course which parties may pursue in their actions against the "receiver of such fish or the produce or value thereof." The other parts of the Act are subordinate to the above enactments.

Giving as liberal construction to the Act as its language will fairly admit, I do not think the servant of the man who supplied the necessary article of bait is entitled to a preferable security for his wages, any more than the servant of the man who supplies boats, provisions or other necessities for the voyage. The baitmaster is protected only because he is expressly named, and if the Legislature intended to extend the protection to his servant, I suppose they would have said so.

The plaintiff cannot claim under the general word "servant," unless he was actually employed in the catching, curing or making of any fish or oil that went into the merchant's hands, which is negatived.

I cannot think that because bait happened to be fish, it therefore comes within the general term "fish" as used in this Act. The Act itself draws the distinction between "bait and fish," and shews that the fish on which a lien is given is a different article from the bait supplied to catch it; the former is intended to be made and cured, and could be followed, the latter is taken for the purpose of being used at once.

If the servant in a bait-skiff is a *casus omissus* from this Act, the Legislature is at hand to remedy the defect, if desirable; but we have to administer the law as we find it, and under it I am of opinion the plaintiff can establish no preferable claim, and has no right of action against the defendant.

Plaintiff must therefore be non-suit.

Mr. John Little for plaintiff.

The Attorney General for defendant.

IN THE MATTER OF THE NEW YORK, NFLD. AND
LONDON TELEGRAPH CO.

1861, *January*. HON. SIR F. BRADY, C. J.

Issue s—Privileged communications—Telegraph messages—Telegraph clerks how far bound to disclose contents of messages to court as witnesses under subpoena.

Notwithstanding the oath administered to telegraph operators in the employ of the New York, Newfoundland and London Telegraph Co., that they should not wilfully divulge or reveal the contents of any message passing over the line.

Held—They are bound when subpoenaed as a witness to give evidence and all facts within their knowledge touching the matter in question; such messages are not in law privileged communications.

THE matter of the New York, Newfoundland and London Telegraph Company came before his lordship the Chief Justice on Monday last. It appears that the attorney general, in the case of the *Queen vs Gorman*, still pending, was desirous of obtaining information as to the purport of a certain telegraphic message sent over the wires last spring, between St. John's and Harbor Main, which it was alleged, had a bearing upon the case. Mr. Waddell, one of the operators, was had before the stipendiary magistrates to give evidence of the fact, but refused to do so on the ground that he had sworn not to reveal the contents of any message passing over the line, when the magistrates were about to commit him for contempt, but it was agreed by consent of counsel that the case be submitted to his lordship the Chief Justice in chambers. Mr. Pinsent, appearing on behalf of the company, argued that these words in the 9th section of the Act relating to the case "shall not wilfully divulge," &c.,

had a special bearing, the terms of the oath binding the operators to secrecy in penalty of one year's imprisonment and £200 fine. The attorney general argued *contra*, directing attention to the term "wilful," as implying that where a party was obliged by law, a "wilful" divulging did not exist, and that the message could not be considered a privileged communication.

The following is his lordship's decision, delivered on Thursday:

In this case, after a full consideration of the general law relating to privileged communications, and as to the true construction of the legislative enactment set forth in the special case, and of the decision of Lord Ellenborough in *Lee vs. Binnell*, 3 Camp. 337, under circumstances so very analagous, I do not entertain a doubt that the communications or messages through the Telegraph office are not in law privileged communications, and that when Mr. Waddell and others in similar positions are compelled to attend a judicial proceeding, they are bound to disclose the contents of such messages, and that in so doing they do not at all violate the oath they have taken, that they will not "*wilfully* divulge" the contents of messages, nor do they subject themselves to any prosecution under that enactment. At the same time let it not be supposed that my decision at all affects the obligation such parties are under "*not to wilfully* divulge the contents of messages," confided to them.

Mr. Pinsent for the company.

Attorney General for the crown.

1861, January. HON. MR. JUSTICE ROBINSON.

Criminal Law—Practice—Bail—Felony—Discretion of Judge of Supreme Court to admit to bail.

(IN CHAMBERS.)

A prisoner is not of right entitled to bail when committed on an express charge of felony, and the judge will not admit to bail in cases of felony unless there is a strong presumption of the party's innocence.

An accused party is not detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him, so as to make it proper he should be tried, and because the detention is necessary to secure his appearance at the trial.

Where on an application for bail by several prisoners in custody on a charge of felony, it appeared that against one, a boy of fifteen, the evidence connecting him with the commission of the offence was slight, and that from his age it might fairly be presumed he acted without premeditation, the judge admitted him to bail.

THIS is an application by Mr. John Little on behalf of the five prisoners above named that they be admitted to bail. The Attorney General opposes the application.

They are in prison on a commitment charging them with felony plainly expressed, viz., with having feloniously demolished the dwelling-house, stores and other buildings of Patrick Strapp, situated at Harbor Main.

It appears from depositions that Mr. Strapp is engaged in mercantile business at Harbor Main, and on the 18th May was possessed of extensive premises there; that he acted as returning officer for that district at the last general election, and that the friends of two of the candidates, Messrs Furey and Hogsett, desired that Mr. Strapp should return them as members elect.

The prisoners were committed on the 21st May, whilst the Supreme Court was sitting. They did not present any petition to be tried that term, and this is their first application for bail.

It is true that the Supreme Court and each judge thereof possess power to admit to bail in his discretion persons charged with any offence whatever, but that extensive power must be used with legal discretion; in truth, in proportion to the extent of the authority should be the carefulness with which it is exercised. The parties were immediately concerned, and the public have a right to see the reasons which influence a judge in such matters, and I will therefore state briefly the grounds of my decision.

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It must be remembered that by the statute of Westminster, bail was forbidden to be taken in cases of felony, and although that law is considerably modified, and the Queen's Bench in England, and the Supreme Court here, are not and never were tied down by its provisions, yet the Supreme Court ought in its discretion to pay a due regard to its enactments, so far as not to admit to bail a person charged with an offence which is expressly declared irreplevisable, without some particular circumstance in his favor,—1 B, Ab 490. A prisoner is not of right entitled to bail when committed on an express charge of felony (*Lofft. 281*), and it is not usual for the Court of Queen's Bench to admit to bail in cases of felony, unless there is a strong presumption of the party's innocence.—4 St. Com. 355

In *Barthelemy's case. 1 E. & B. 9*, Lord Campbell states that a prisoner cannot be admitted to bail unless he makes out that there are not sufficient grounds for his detention. It is for the judge to decide, according to his discretion in each particular instance, whether the case was one which require the detention of the prisoner (7 C. & P. 799); and in so deciding, the judge will be mainly influenced by any unreasonable delay of the Crown in bringing on the trial, by the sufficiency of the evidence against the prisoner, by the enormity of the offence charged, its dangerous tendency, or its notoriety—1 B. A. 492. And for these purposes he will look at the depositions.

Nor should the provisions of the Habeas Corpus Act be overlooked by a judge in exercising his discretion to admitting a prisoner to bail, for that enactment was made with a view to conserve the liberty of the subject as far as was deemed practicable and safe, and even under the 7th section of that Act these prisoners would not be entitled to make an application for bail from want of prosecution until the expiration of the next term of the Supreme Court.

These being the general principles which govern me in deciding the present application, I shall first consider whether there has been any unreasonable delay on the part of the Crown in preferring a bill before the grand jury during the last term, irrespective of other considerations and circumstances in the case. The affidavit of the Attorney General sufficiently disposes of that question. He states that there were other parties concerned in and with the felony, besides those in prison. It would be very inconvenient to try some without having all indicted. That Mr. George Hogsett, who acted as the professional adviser of the prisoners, and cross-ex-

examined the Crown witnesses, assured him that no proceedings were necessary for the purpose of bringing in the parties so charged and in gaol, as he would see that they surrendered themselves to justice; that none have so surrendered themselves, and that subsequently warrants were issued against them, but they have evaded capture and are not yet in custody. The Attorney General further states that about the middle of the term he did endeavor to procure the attendance in St. John's of the necessary witnesses to support a bill before the grand jury against those in gaol on this charge, and for that purpose issued subpoenas, but he was unable to procure such attendance—one of the witnesses not to be found, and the other being about going to the fishery. Considering therefore the period of commitment, and the foregoing facts, I think that no unreasonable delay has intervened in preferring a bill to the grand jury.

As to the sufficiency of the evidence disclosed on the depositions I shall say as little as possible, that I may not prejudice the accused. Against one of them, viz, John Penny, the evidence connecting him with the riotous demolition of the house and buildings is very slight, so slight that, coupled with the fact of his only being fifteen years of age, and not likely to have acted with any premeditation, I feel justified in admitting him to bail. As regards the other four prisoners, I am constrained by a clear sense of duty to refuse to admit them to bail. I have no desire to prejudge them; they may be enabled satisfactorily to explain their conduct, but on the face of the depositions they are charged expressly with the commission of an offence of great enormity, of most dangerous tendency, and of mischievous notoriety. From these depositions I learn that a crowd numbering, according to Mr. Little's admission, 500 persons riotously assembled at Harbor Main in open day, without any alleged cause of excitement or provocation—their object apparently being to coerce or to punish Mr. Strapp in and for some matter connected with his duty as returning officer. It appears that at an earlier hour of the same day some of the prisoners called at Strapp's enquiring for him, and then uttered threats of what would occur; and accordingly, later in the day, the main body, numbering as aforesaid, approached his house, and on a signal they methodically surrounded it; they searched it for his person, and failing to find him they commenced their work of destruction; they were provided with hatchets and a large rope; different parties of the mob assaulted different buildings on his premises, and speedily they tore down and

utterly demolished his dwelling-house, office, cow-house, stable, blacksmith's forge, provision store, oil store, and two other stores, scattering and destroying the property therein; they partially tore down part of his fishing stage, smashed every article of furniture in his house, except two chairs, ripping open feather beds, and scattering the wearing apparel of his family. No one interfered to check these proceedings, and in a short time the comfortable homestead of a respectable man was reduced to a heap of ruins by a lawless mob.

Such an open contempt of law, so violent an outrage on property and on the peace of society, has, I rejoice to say, never before within my experience been perpetrated in this colony. A foreign enemy could not have more effectually and more ruthlessly inflicted ruin upon his foe, than the people of Harbor Main appear to have done upon their neighbor. If such conduct were tolerated, no man's person or property in the colony would be safe, and as a natural consequence capital and industry would speedily seek a more secure and congenial domicile, to the grievous prejudice of the country.

In considering an offence with reference to the bail of the offender, the premeditation with which it has been committed, and the absence of those sudden temptations and provocations which are often found too powerful for human passions to resist, are important elements, and it is impossible not to see the presence in this case of such premeditation, and the absence of such provocation.

I may accede to the authority quoted by Mr. Little (*R. O. Scaiffe*), although it has been somewhat questioned, and I adopt the language of Coleridge, J., with reference to that case in *1 E. & B.*, "I do not think an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him, so as to make it proper he should be tried, and because the detention is necessary to secure his appearance at the trial." Now, in weighing the probability of these prisoners appearing to stand their trial, I am bound to consider the magnitude of the offence, and the punishment awarded to it. But a few years ago that punishment was death, and still it is very severe. And I cannot ignore the facts as stated by the Attorney General, and not contradicted, that the capture of those in prison was only effected by the aid of the military, whilst those for whose appearance Mr. Hogsett had pledged himself, and for whose apprehension warrants are out, have not yet been taken.

Although I do not believe there is any man who has a more tender regard for the liberty of the subject than I have, or who would have more satisfaction in getting these men free than I should, yet I feel that every principle and precedent forbid me, under the present state and circumstances of this case, to interfere for the purpose of admitting them to bail, and as regards the four first named I am constrained to discharge the rule, making it absolute as regards the boy, John Penny, who may be bailed.

Mr. Jno. Little for applicant.

Attorney General for the Crown.

QUEEN v. GORMAN ET AL.

1861. HON. SIR F. BRADY, C. J.

Criminal Law—Practice—Bail—Power of Judge in Chambers to review decision of another Judge sitting in Chambers.

(IN CHAMBERS.)

When an order is refused by a judge upon hearing the parties, the applicant if dissatisfied should apply to the court and not to another judge. A pressing necessity and peculiar circumstances should exist to warrant a judge to interfere with the order of another judge.

Where on an application to a judge in chambers to admit to bail several prisoners in custody on a charge of felony, the application was refused, the prisoners renewed their application before another judge in chambers.

Held—The judge was not authorized to entertain the application.

THE chief justice, agreeably to appointment, attended in chambers to-day to hear the renewed application for bail on the part of those persons now in gaol, said to be implicated in the destruction of Mr. Strapp's property at Harbor Main.

Mr. George Hogsett appeared for the prisoners, referred at length to the affidavit of merits made by his clients, and suggested that parties identified by the leading crown witness were those to whom she applied for assistance, and from whom she had received assistance. The presence of these persons under such circumstances afforded no presumption for their guilt; they were more conservators of the peace than promoters of

outrage. He then submitted the application to his lordship, as being a reasonable one; and stated the prisoners had every confidence in his decision.

The attorney general opposed the application, as being in its nature, very unusual. An application for the same parties, on the same grounds, had been previously made to Mr. Justice Robinson, by whom, after mature deliberation, it was refused. The attorney general then remarked on the inconvenience and confusion likely to ensue by one judge attempting to superede or set aside the decision of a brother judge of the same court, and of equal authority. Counsel then quoted *Hagley's Crown Practice*, and some cases from *Tauton's* and *Tidd's Reports*, to show that such a course of proceeding was never adopted in England; he instanced a case in which the party might apply in rotation to the twelve judges, failing in each application. Counsel contended that if such a practice were allowed, the party might apply to another judge for a counter order, and thus promote irregularity in the administration of justice. If new circumstances arose, any judge might grant a rule to vary or amend the order previously made, but it would only be heard by the judge making the original order.

The attorney general, however then addressed himself to the merits of the application, as contained by the depositions in the case, and submitted that the case was one of such glaring outrage that the parties implicated in it should not be admitted to bail. These arrests were made during the last sitting of the court, and Mr. Hogsett, the new counsel for the prisoners, had engaged to surrender other parties implicated, which engagement was not carried out. No time was lost in promoting the trial of the case, owing to the absence of witnesses and the impossibility of procuring evidence at that time. The learned counsel concluded by referring his lordship to the proceedings already taken in the case. The chief justice would dispose of the application on Thursday next.

On a subsequent day the following judgment was delivered:—

IN this case Mr. Hogsett applied to me in Chambers on Tuesday last, on behalf of the several parties named, for a verdict of *habeas corpus* to bring them before me from the gaol of St. John's, where they are in custody, in order that he might make an application to admit them to bail. The Attorney General appeared, to resist the application. I stated that I would at once direct a writ or writs to issue and have the par-

ties before me to hear their application, but all parties considered that formal proceeding unnecessary, and I hear Mr. Hogsett's motion on their behalf, as if they were present. The application so far as concerns the four first-named prisoners came before me under circumstances altogether different and distinct from the application on behalf of Daniel Sullivan, and I will therefore dispose of it at once, because I am satisfied that I would not be justified in point of law in entertaining it at all, as their case has been already judicially determined, so far as the jurisdiction of a judge in Chambers extends. It appeared upon the discussion of this case when it was first mentioned before me, on the 20th instant, that a similar application had been made before Judge Robinson upon the same grounds, on behalf of these parties and one John Penny, and it was refused so far as related to these parties, while John Penny was admitted to bail. I then stated, as that was a motion addressed to the discretion of the judge before whom the application was made, and as he had exercised his legal discretion upon it, and refused that application, I was of opinion that I could not entertain it, and I allowed the case to stand until Tuesday last, in order to give Mr. Hogsett time to consider that objection, and Mr. Hogsett has not cited any precedent in which such a course was ever adopted by any judge, as I am asked to take in this case. Since then I read over the decision of Judge Robinson, and I find that the two applications rest on precisely similar grounds, and therefore the first question I would naturally ask myself, is: what right have I, in the exercise of my discretion, to declare that Judge Robinson, in the exercise of his discretion, was wrong? And if I had such authority, but, instead of declaring that he was wrong, I held that he was right, then it would be competent for these parties to go before Judge Little, and he might, in the exercise of our discretion, come to a different conclusion, and hold that we were both wrong in the exercise of our discretion, because in Chambers, each of the judges possesses like powers and jurisdiction over this subject. I might easily show how such a course of proceeding would prove most mischievous to the administration of justice; but, it is sufficient to say that as this case comes before me, the law does not warrant or permit it, and that I would be acting in violation of express decisions, if I assumed to alter or affect Judge Robinson's decision by the exercise of my discretion in opposition to his, and that in my judgment the law does not afford any appeal from that decision

to any other individual judge, or to any tribunal save to the court in term. In Bagley's Chamber Practice, 28, the law is thus laid down: "When an order is refused by a judge upon hearing the parties, the applicant, if dissatisfied, should apply to the court and not to another judge." In *Wright v. Stephenson*, 6 *Taunton*, 850, the practice of applying to a second judge for an order which has been refused by the first judge, was severely "reprobated." In *Johnston v. Kennedy*, 4 *Dowl. P. C.*, 347, *Park, J.*, said, "whenever an application is made to me at Chambers to rescind the order of another judge, I always refuse it. The proper course is to apply to the court;" and in *Tomlinson v. Harvey*, 2 *Chit., R.*, 83, it was ruled that "a judge will not interfere with another judge's order." I do not mean to rule that there might not be a case in which a judge would be justified in interfering with the order of another judge, but a pressing necessity and peculiar circumstances should exist to warrant him in doing so in the most trivial matter; and in this instance no necessity of that kind could exist, for the judge who made the order is at hand, and available to alter or rescind it. I do, however, say that no authority can be found to countenance an application like the present to a second judge for an order which another judge had refused under the same circumstances, in the exercise of that discretion which the law had vested in him, and which exercise of discretion it was sought to question and impeach in the second proceeding. Upon these grounds, I feel that I am not authorized to entertain the application on behalf of these parties to be admitted to bail; and I must therefore say no rule on Mr. Hogsett's motion, so far as it relates to them.

With respect to the application on behalf of Daniel Sullivan: that comes before me as an original application on his behalf to be admitted to bail, and if upon a review of the circumstances of his case, I deemed it a proper one for the exercise of that discretionary power with which the law invests me, it would be my duty to admit him to bail, and I should gladly discharge that duty. His committal charges him with this offence "for that he with divers other persons did unlawfully, violently, and tumultuously assemble together to the disturbance of the public peace, and being then so unlawfully, violently, and tumultuously assembled together, did then feloniously, unlawfully and with force demolish or destroy a certain dwelling house, stores, and other buildings the property of Patrick Strapp," &c., &c. That commitment was based upon

the depositions taken before the committing magistrates, one of which is as follows :

The examination of Margaret Deady, of Harbor Main, widow, who saith : " I am daughter of Patrick Strapp, and lived with him at Harbor Main up to Saturday last the 18th June, on which day, about noon, Richard Walsh, Cornelius Kennedy, John Kennedy, of Holyrood, Walter Gorman, Michael Gorman, and James Woodford, of Harbor Main, came to my father's house and wanted to know if my father was in ; they were told he was not at home ; they all left. In the evening, about half-past six o'clock, a large number of men assembled in front of my father's house. James Woodford, Michael Gorman and Cornelius Kennedy came into the house, they asked if my father was at home ; my mother told them he was not ; Cornelius Kennedy went up stairs to search for my father. Woodford and Michael Gorman remained below in the kitchen ; Kennedy might have been ten minutes up stairs, when he returned to the kitchen, and three of them then joined the mob, Walter Gorman and John Quinlan, son of Peter Quinlan, came into the house and said he should be found, meaning my father, and went up stairs followed by another man whose name I do not know ; they remained up stairs, and I heard them smashing doors, windows, furniture, and everything, and at the same time the windows of the house were smashed from the outside ; a man, a stranger to me, smashed a picture in the kitchen : I ran into the back kitchen for safety, where I found Timothy Sullivan and James Furey. I asked them for God's sake to take me out safe, and got between them to save myself from the stones which were coming through the windows. I got away from the house and went into a back field. I had taken down the names of a few of the heads (I mean the first of them that I knew) and the paper upon which I had three or four of their names was partly out of the pocket of my dress when James Furey snatched it out of my pocket and said " What is this ? " I told him it was a paper belonging to myself ; he kept the paper, upon which were the names of Michael Gorman, John Kennedy, James Woodford, and Cornelius Kennedy, written with lead pencil. The mob were destroying the house and furniture. I saw Walter Gorman with a hatchet ; he broke a table belonging to myself in pieces. I saw other men, whom I did not know, with hatchets cutting away at the dwelling-house ; I saw James Woodford in front of the cow house ; some of the mob were then scattered about, pulling down the rest of

the houses, destroying nets. The persons whom I recognized among the mob besides others I have mentioned, were James Furey, Daniel Sullivan, Timothy Sullivan, Michael Esical, Peter Esical, William Dwyer, of Holyrood, John Hickey, John Gorman, Michael Joy, John Fling, of Chapel's Cove, John Furey, and I saw John Penney running away with part of a loaf of sugar. I have no doubt about those I have named, and I knew others by sight, but cannot tell them by name; all of them were employed; the dwelling-house was the first they attacked; the next was the cow house and stable; the next was an old dwelling house which my father had formerly occupied and in which he kept some powder; I do not know how much, also provisions such as bread, butter, sugar, and fish, and some furniture belonging to myself; a small oil store attached to the old dwelling house where there was oil at the time; a blacksmith's forge and a linhay attached to a store in which was kept hay, all of which was destroyed, and two other stores, one on the side of the road, and the other at the waterside, where coals and rope were kept, and an office where my father kept all his books and papers, all of which were destroyed; the fishing stage was partly destroyed, and a quantity of molasses contained in a puncheon was rolled away. In the roadside store there was a quantity of seed potatoes, some of which were cut. I saw some of them on the street, some flour, some meal, pitch and tar, empty barrels, tubs all broken and destroyed. One large rope was used in trying to pull down the house, the roof of which and the chimney they could not succeed in tearing down. All the partitions and floors up stairs were destroyed, grates pulled out and smashed up, every article of furniture, with the exception of two chairs, smashed and destroyed, nearly all the wearing apparel belonging to the family was destroyed and torn in pieces. A valuable waggon, sleigh, horse-harness and other saddlery were all destroyed. The chapel and nursery are separated from my father's late residence by a small field, and the clergyman's residence is not far from the chapel. My mother was at home when first they came in, and I cannot tell when she left. There was a servant man, Thomas Murray, employed outside fixing up fences; I saw my brother, Patrick, just before the mob came along; did not see him afterwards. I was in a great bodily fear until I got out of the house.

The statements in that deposition are corroborated by the evidence of Catherine Power who was a servant in Strapp's house, and she further stated that when the party first came

the house, about 12 o'clock in the day, "my mistress, Mrs. Strapp, her daughter, Mrs. Deady, and her son, Patrick Strapp, were at home, when I saw James Woodford, Walter Gorman, Michael Gorman and Cornelius Kennedy in the kitchen. I heard Michael Gorman reading from a piece of paper which he said came by telegraph from Mr. Furey, that if Mr. Strapp would return Hogsett and Furey it would be settled and nothing done. Mrs. Strapp told them her husband was not at home, and Walter Gorman said he heard he was there this morning. Mrs. Deady said something, when Walter Gorman said to her "better mind what you are saying or else you will know something in short." There is also a deposition in further corroboration of Mrs. Deady's testimony from Thomas Murray, a servant in the employment of Mr. Strapp. The applicant, Daniel Sullivan, has filed an affidavit in which he admits he was present at this outrage and merely denies a guilty participation in it. It also appears that although the informations were sworn against him on the 21st of May last he has evaded arrest until Friday last the 19th inst.

Under these circumstances, I am bound to give credit on this application to the depositions of the witnesses for the Crown, and they involve the applicant in a charge of the gravest character, and exhibit the district to which he desires to return as one in which there is no safety for person or property, one in which the law of the land is set at defiance, and a reign of terror is established in its stead. This is not the case of a quarrel between some parties, and an attack upon person and property arising out of that quarrel, but it is an uprising of a lawless mob of several hundred persons against the laws of the land, for the purpose of compelling one who holds Her Majesty's commission of the peace, and who was returning officer at the late election, by intimidation, violence, and the destruction of his property, to execute his functions as such returning officer, not according to his conscientious sense of what his duty demanded, but at the audacious dictation of an individual named Furey, I presume one of the candidates at that election. This is the character of the offence for which the applicant is committed, and when I consider that he has evaded arrest for such a length of time, and that others of the accused parties still evade arrest, although Mr. Hogsett gave an undertaking that they would surrender themselves; and when I view, with just alarm, the present lawless condition of this district, and that of the hundreds engaged

in this outrage, only a few have been identified and arrested, and that all who were criminal enough to engage in it, will be also, I fear, prepared to combine to baffle justice and defeat the prosecution of their friends by every means in their power, acting under an honest judgment, I cannot, in what I conceive to be a sound exercise of that discretion which the law has vested in me, incur the risk of a possible failure of justice by liberating this party upon bail, and I must therefore refuse also this part of Mr. Hogsett's application.

Attorney General for Crown.

Mr. Hogsett for applicants.

A. SHEA, EX. OF SAM. CARSON, v. PETER COWAN.

1861, *January*. HON. MR. JUSTICE LITTLE.

Practice—Demurrer—Amendment of pleadings, when allowed.

When on a judgment sustaining the demurrer leave to amend the pleadings was applied for, but opposed on the grounds that two demurrers had already been over-ruled.

Held—That leave to amend was in the discretion of the court, and was usually granted when the pleadings were bona fide and not for delay.

It was an action of covenant for arrears of rent, and amongst the pleas put in by defendant was one to the effect that he and the said Samuel Carson in his lifetime—to wit, in the month of January, 1860—accounted between them for all rent then payable by the said indenture, &c., and then in consideration of the said defendant having permitted the said Samuel Carson to erect and enjoy the use of a building on defendant's land, and of great losses which the defendant has sustained in consequence of fire on his said premises, and of goods delivered by the defendant to the said Samuel Carson, and for work performed by the defendant for time computed and agreed upon by the parties, as equivalent to any sums then payable on breach of said covenant—to wit, to the sum of £47 10s. cy., and which were accepted and received by the said Samuel Carson in full satisfaction and discharge of the said amount and breach of covenant, and for all damage sustained. The causes of demurrer assigned were the insufficiency and uncertainty of the

matters stated in accordance and satisfaction. The judge cited *Barker v. Thorold*, in a case of covenant the plea declared bad; the words "other necessary changes," being too general and uncertain; cited also *Cumber v. Wane*, 1 *Smith's leading case*, 146. The judge could not say what effect these matters would have if put in such a shape as would enable the court to pronounce on them at present; they were too general and uncertain. Judgment for the demurrer.

Mr. Carter moved for leave to amend.

The attorney general opposed this, being the second demurrer in the case.

The judge held that leave to amend was in the discretion of the court, and was usually granted when the pleadings were bona fide and not for delay. Leave granted until Monday evening; defendant to plead issueably.

Attorney General for plaintiff.

Mr. Carter for defendant.

IN RE HARRIET SOPHIA RUTHERFORD, AN INFANT.

1861, *January*. HON. MR. JUSTICE ROBINSON.

Infant—Guardianship—Ward of court—Removal of infant from jurisdiction of court—Domicile of infant.

On an application by one of the guardians of a ward of court praying for an order to inhibit another of the guardians of the said ward from removing the said ward from the jurisdiction of the court.

Held—The court will not suffer its ward to be carried beyond its jurisdiction, so that as regards its education, religious training, or personal safety, it should be out of reach of the court.

THIS is an application made by George C. Rutherford, an uncle and one of the guardians of the infant, named by the court, praying that I should inhibit John Stark, Esq., the grandfather and another of the so-named guardians, from removing the said ward beyond the jurisdiction of this court, and that the said infant should be placed in the care and custody of the petitioner, George C. Rutherford.

It appears that the infant is four years of age, and has been living with Mr. Stark since she was a few months old;

that her father, shortly before his death in 1859, wrote in terms of gratitude to Mrs. Stark for her past attentions to his child, and expressed his confidence in her future care of it; and there is nothing whatever shown to me to lead me to doubt that the like tenderness and care have been continued towards the girl by that lady. If therefore Mr. and Mrs. Stark were intending to remain in the colony, I should not think of disturbing the relations that at present subsist between the grand-parents and child, with so much apparent advantage to the latter. But it is admitted that Mr. and Mrs. Stark propose shortly to leave Newfoundland with a view of permanently residing in England, and that they desire to take with them their said grand-daughter, to which step the petitioner strongly objects, and I feel bound to yield to that objection.

The fortune of this ward, amounting to upwards of £3000, is deposited in this country, which was her father's and is her own domicile. It is the duty of the lord chancellor in England, and of each judge of Supreme Court in Newfoundland, to act with all the anxious care and vigilance of a parent over the person and property of an infant ward of court, and it is a well understood and obvious principle that that court will not suffer its ward to be carried beyond its jurisdiction, so that either as regards its personal safety, its education or religious training, it should be out of the reach of court. I feel, therefore, constrained to inhibit Mr. Stark from removing the infant ward out of the jurisdiction of this court, and I hereby order him within one week to give such security to that effect, and also to perform his duties of guardian to the person of Harriet Sophia Rutherford as the master shall approve. On such security being given, I shall feel myself well justified in leaving the child under what I believe to be the affectionate care of Mr. and Mrs. Stark, so long as they shall remain in this colony, or until further order.

It has been brought under my notice that the guardians named by this court have not furnished the necessary security antecedent to their becoming legally clothed with the rights of guardians, but acting as such over a ward of court will bring them under the control of the court, although such acting may not invest them with the privileges of the office.

The future custody of this ward, and the amount to be allowed for its maintenance, must be the subject of further application to this court, when no doubt it will give due consideration to the general rule of law which forbids the parties interested

in the reversionary estate of an infant having the custody of her person.

Objection has been very properly taken on behalf of the infant by Mrs. Stark and by Mr. Carter to the fact that no part of the infant's fortune is yet separated from the mercantile business of her father. I have read some documents which profess to secure it; but without offering any opinion as to the sufficiency of such security, I will at present only observe that although the administrators of Henry Rutherford's estate and their sureties are responsible for the child's property, it would be proper and regular that it should be withdrawn from the commercial business of her late father, pursuant to the terms of his co-partnership, and should be properly invested in a separate fund to the credit of the infant's estate. Let the inhibition and order go according.

The Attorney General on behalf of George C. Rutherford,

Mr. Carter, Q. C., on behalf of John Stark.

MORIARTY v. KAVANAGH.

1861, *January*. HON. MR JUSTICE LITTLE.

Arrest—Member of House of Assembly Newfoundland—Privilege, freedom from arrest—How far privilege extends.

A member of the House of Assembly of Newfoundland has the same privilege from arrest during the sitting of the Legislature and for forty days before and after the meeting thereof as a member of the House of Commons in England. Where the defendant, a member of the House of Assembly of Newfoundland, had been arrested under a *capias ad respondendum*, on the 11th day of Oct., and the House of Assembly was prorogued to the 16th of the same month,

Held—(On application for a rule *nisi* calling on the plaintiff to show cause why the arrest should not be set aside, making the rule absolute) the defendant had been arrested within forty days from the time to which the Assembly had been prorogued and was therefore entitled to be discharged.

In this case the defendant has been arrested under a *capias ad respondendum* at the suit of the plaintiff for £60 13s. 4d., and Mr. Carter, the defendant's counsel, obtained a rule *nisi* from the Chief Justice, requiring the plaintiff to show cause why the arrest should not be set aside and a common appearance noticed for the defendant upon the ground that he is a

member of the House of Assembly of this colony, and therefore privileged from arrest during the sitting of the legislature, and for a convenient time before and after each session. The rule has been argued before me, and I am called upon to decide the question now raised for the first time in this colony. The defendant's claim to be discharged has been rested upon the analogy which it has been urged exists between the rights of a member of the House of Commons in England under similar circumstances and a member of the local legislature of this Island. Several authorities were cited bearing upon the former but not one distinctly in point upon the rights of the latter. In May's *Præcise of Parliament*, p. 105, it is said, "The privilege of freedom from arrest or molestation is of great antiquity, and dates probably from the first existence of parliaments or national councils in England." He goes on to shew its observance by usage, but also remarks in p. 116, that under various statutes which he quotes "the freedom of members from arrest has become a legal right rather than a parliamentary privilege. The arrest of a member has been held, therefore, to be irregular *ab initio*, and he may be discharged immediately upon motion in the Court from which the process issued."—*Colonel Pitts' case*, 2 *Strange*, 985. It is stated by Blackstone and others, and is the general opinion, that the privilege of freedom from arrest remains with a member of the House of Commons "for forty days after every prorogation, and forty days before the next appointed meeting"—*May*, 118. In *Grady v. Duncombe*, 5 *D. & L.* 209, decided in 1847, Mr. Duncombe was released from arrest by a judge's order in virtue of his privilege. On a motion subsequently made for rescinding the judge's order, the Chief Baron, in delivering the judgment of the Court, stated: "We think that the conclusion that is to be drawn from all that is to be found in the books on the subject is this: that whether the rule was originally for a convenient time, or for a time certain, the period of forty days before and after the meeting of Parliament, has, for about two centuries at least, been considered either a convenient time or the actual time to be allowed. Such has been the usage, the universally prevailing opinion on the subject, and such, we think, is the law." The reason of the rule is that members may not be obstructed in the exercise of their legislative functions either during the sitting of Parliament or for the stated period before or after the meeting thereof.

Such being the law of England, the question is, does it apply to members of a Colonial Assembly? and 2nd, are the circumstances of this case such as to entitle the defendant to be discharged? In the absence of any direct authority on the first point, I shall refer to the general principles laid down by Baron Parke in delivering the judgment of the Judicial Committee of the Privy Council in the case of *Kielley vs. Carson, et al.* upon the power claimed by the House to punish for a contempt or breach of privilege a person charged by one of its members with having used insolent language to him out of the doors of the House in reference to his conduct as a member of the Assembly. "Newfoundland," he states, "is a settled, not a conquered colony, and to such colony there is no doubt that the settlers from the mother country carry with them such portion of its common and statute law as was applicable to their situation, and also the rights and immunities of British subjects. Their descendants have, on the one hand, the same laws and the same rights (unless they have been altered by Parliament); and, on the other, the Crown possesses the same prerogative and the same powers of government that it does over its other subjects; nor has it been disputed in the argument before us, and therefore we consider it as conceded that the Sovereign had not merely the right of appointing such magistrates and establishing such corporations and courts of justice as he might do by the common law at home, but also that of creating a local Legislative Assembly, with authority, subordinate indeed to that of Parliament, but supreme within the limits of the colony for the government of its inhabitants. This latter power was exercised by the Crown in favor of the inhabitants of Newfoundland in the year 1832, by a commission under the great seal, with accompanied instructions from the Secretary of State for the Colonial Department, and the whole question resolves itself into this, whether this power of adjudication upon and committing for a contempt, was, by virtue of the commission and the instructions, legally given to the new Legislative Assembly of Newfoundland; for under these alone can it have any existence, there being no usage or custom to support the exercise of any power whatever. In order to determine that question, we must first consider whether the Crown did in this case invest the local Legislature with such a privilege. If it did, a further question would arise, whether it had the power to do so by law? If that power was incident as an essential attribute to a Legislative Assembly of a depen-

dancy of the British Crown, the concession on both sides that the Crown had a right to establish an Assembly, puts an end to the case. But if it is not a legal incident, then it was not conferred on the Colonial Assembly, unless the Crown had authority to give such a power or actually did give it."

Upon the construction of the commission and of its accompanying document, their lordships were of opinion that no such authority was meant to be communicated to the Legislative Assembly of Newfoundland, even if the Crown had the power contended for, on which no opinion was given; and if it did not pass as an incident by the creation of such a body, it was not granted at all.

He proceeds to state, "The whole question then is reduced to this—whether by law the power of committing for a contempt, not in the presence of the Assembly, is incident to every local Legislature. The statute law on this subject being silent, the common law is to govern it; and what is the common law depends upon principle and upon precedent.

Their Lordships see no reason to think that in the principle of the common law any other powers are given them than such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute—These powers are granted by the very act of its establishment—an act which on both sides it is admitted it was competent for the Crown to perform. This is the principle which governs all legal incidents. "*Quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa esse non potest.*" In conformity to this principle we feel no doubt that such an assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt to secure the free exercise of their legislative functions, they are justified in acting by the principle of the common law. But the power of punishing anyone for past misconduct, as a contempt of its authority, and adjudication upon the fact of such contempt, the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a different character and by no means essentially necessary for the exercise of its functions by a local Legislature, whether representative or not. All these functions may be well performed without this extraordinary power and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions." The judgment then proceeds to show that,

while the House of Commons has the power contended for in that case by virtue of ancient usage and prescription, yet that affords no ground for holding that it belongs as a legal incident by the common law to an assembly with analogous functions.

The subject under consideration in this cause, though substantially different in several respects from that decided by the foregoing judgment, has some important points of resemblance to it, particularly in the application of those general principles on which both questions rest. If the privilege from arrest be "incident as an essential attribute to a Legislative Assembly," according to Baron Parke, that disposes of the main point. Is such a right necessary to the existence or the proper exercise of the functions of the Assembly? If so, "to the full extent of every measure which it may be really necessary to adopt to secure the free exercise of their legislative functions, they are justified in acting on the principle of the common law." Now, it appears to me, if the members of the Assembly were liable to be arrested for debt during the sittings of the Legislature, their functions would be subject to serious obstructions. The making of laws for the government of the colony is a matter of too much importance to be exposed to such a contingency. The policy of the law, as well as the integrity of the constitution, are opposed to any undue interference with the free action of a legislator in performing his duties. As an invariable practice at the opening of each new Assembly, the Speaker demands from the representative of the Crown, among other privileges, freedom from arrest for the members of the House of Assembly, to which the Governor replies in general terms, affirming all the rights and privileges to which they are by law entitled.

It has been decided by the Supreme Court in the case (cited in argument) of *Bearnes v Emerson*, that an attorney of the Court is not liable to be arrested for debt. So every party attending as a witness or party to a cause in Court is privileged from arrest whilst going to, attending and returning from Court.—*H. B.*, 636. Barristers while on circuit also enjoy the same privilege, and it is not confined to an attendance in the Supreme Courts, but has been holden to extend to all inferior courts of law, such as the Sessions, &c., and even to an attendance before an arbitrator in a cause referred under an order of Court. If such be the jealousy with which the law guards the administration of justice from obstruction, it has been urged with much reason that it is not less vigilant in protecting the freedom and independent action of the law-makers from like interruption.

Then, if the main principle be conceded, as incident to the constitution, how long shall the privilege protect members? By analogy to the House of Commons and the decisions in English Courts already referred to, it is contended that it protects them for forty days before and after the meeting of the Legislature, as well as during the sitting thereof. Assuming this to be what, in the language of the authorities, is termed "a convenient time," we have now to inquire, has the defendant brought himself within that limitation; in other words, was he arrested forty days before or after the meeting of the Legislature, or the time legally defined for the meeting thereof? The affidavits show that he was arrested on the 11th October instant—that the legislative session was closed in June last—that no session has been since held and no proclamation issued summoning the Legislature for the despatch of business; but under the authority conferred upon the Governor by the Royal Instructions, proclamations have been issued proroguing the Legislature since last session; first to the 16th August last, then to the 16th October, and then to the 20th December next. These are formal acts of the Governor in the exercise of the prerogative of the Crown not requiring for their efficacy the presence of the members or any official to represent the House at the promulgation thereof. From the closing of a session until they are expressly summoned to meet again all legislation is suspended, still the Assembly continues in existence, and the legal effect of a prorogation of that body does not differ in strictness from that of the prorogation of the House of Commons. The object of the law is to afford protection while the services of the legislator are required, and a reasonable time before and after each session to secure that object. The words used in the Commission for the prorogation of the Imperial Parliament are the same in effect as those used in the prorogation of the Assembly at the close of a session, though they are somewhat different from those used in the Governor's proclamations. The former are that "It is Her Majesty's will and pleasure that this Parliament be prorogued" to a certain day, "to be then here holden; and this Parliament is accordingly prorogued." On further prorogations the Commons are represented at the bar of the House of Lords by their clerk assistant and second clerk assistant, the Commission is read, and the Lord Chancellor prorogues the Parliament in the usual manner.—*May, 209*. Now, the Governor's proclamation states, "I do, therefore, by this, my proclamation, further

prorogue the General Assembly until Wednesday, the 16th day of October next, of which all persons concerned are required and commanded to take due notice and govern themselves accordingly"; while the proclamation for an actual meeting of the Legislature expressly summons and calls the members to assemble "for the despatch of business." It may be said that the special nature of this notification is intended as a matter of convenience to all concerned; certainly it is the only proclamation on which members consider themselves bound to attend in Parliament. But the legal effect after prorogation still remains the same, and it is considered that they might properly assemble on the day to which Parliament has been prorogued, unless a further prorogation takes place in the meantime. May states in p. 118: "And by reason of frequent prorogations the enjoyment of this privilege is never liable to interruption."

As the defendant was arrested on the 11th October, and the Assembly was prorogued to the 16th October, he was, therefore, taken within forty days from the time to which the Assembly was prorogued, and is, therefore, entitled to be discharged upon the authorities and principles to which I have referred. In *Duncomb's case* the forty days were said to run from the arrest to the return day of the election writ, although Parliament was prorogued to a subsequent date and did not meet on the day named in the writ. As to the hardships of the case on one side or the other, or the policy of the law of arrest for debt or mesne process, referred to by counsel, I am not bound to notice these matters, as they cannot influence my opinion in the slightest degree; my duty is to administer the law as it stands, and it is for the Legislature to alter it if it should deem it expedient to do so; and, without sufficient grounds shown for its interruption, I quite agree that it ought to take its regular and ordinary course. In making the rule absolute for the discharge of the defendant upon finding common bail in this and the case of *Fleming v. the same defendant*, in which a similar application was made. I may observe that as the question is novel and important, and, as it first appeared to me, not devoid of doubt or difficulty, I should be glad, if the parties think proper, that it were submitted to the Supreme Court for further adjudication.

Attorney General for plaintiff.

Mr. Carter for defendant.

1861, December. BRADY, C. J.; ROBINSON, J.; LITTLE, J.

Criminal Law—Practice—New trial—Absence of qualification of juror—Misdirection—Verdict contrary to evidence—Power of Supreme Court to order a “venire de novo.”

The Supreme Court of Newfoundland possesses all the powers of the Court of Queen's Bench in England, and can therefore legally order a new trial in a criminal case.

Where the defendants were convicted of manslaughter a motion was made on their behalf for a *venire de novo* on the grounds that there had been a mis-trial, (1), because three of the jurors who tried the case did not possess the qualification prescribed by law; (2) mis-direction; (3) verdict contrary to evidence.

Held—Discharging the rule (Robinson, J., differing), exception to the want of qualification of a juror taken after verdict is not sufficient to warrant the Court in ordering a *venire de novo*, the objection would have been a good cause of challenge.

The proper time for a party to make his objections to a judge's charge is at its conclusion, so that the judge may have an opportunity of correcting himself, otherwise such objections cannot otherwise be relied on.

UPON this application for a new trial I concur with my brethren on the bench, as to the first objection to the verdict, that there is not, at this period of the proceedings, any foundation for the objection taken to the constitution of the jury; and as to the second objection, which rests upon the ground of mis-direction to the jury in point of law, and that the verdict is contrary to the evidence, I would in the first place observe that the application is one of a very novel character in a case of felony; without precedent, so far as I am aware, in this country; and, as far as we could discover, with only one satisfactory case in the judicial records of England to sustain it; but it is one in which I am of opinion that we have jurisdiction.

As to the second ground of objection, which is that the verdict was contrary to evidence, and for mis-direction in the charge of the learned judge, or rather of the three judges who were parties to that charge, as to the law to which they were bound to apply the evidence in this case. The circumstances under which the homicide took place are thus briefly stated in the charge: “It appears that in pursuance of previous arrangement, early in the morning of the second of May, a body of men from Harbor Main and its vicinity numbering about 300, headed by Father Walsh and Charles Furey, a candidate, proceeded with colors flying, into Cat's Cove, uttering, as it is stated, threats of violence. The Cat's Cove men, in addition to-

their letter of the previous day, sent a deputation to meet them and to entreat them to stay back; and failing in their peaceful endeavors to keep away this large array, had erected a barricade across the road, and had assembled to the number of forty or fifty on a hill in their own place, as they alleged, to protect themselves, having amongst them some sealing guns. The natural consequence of such a state of things quickly developed itself. Stones were speedily in requisition, fences were prostrated, a rush was made by the Harbor Main crowd, guns were fired upon them by the Cat's Cove people, several were wounded, and George Furey was killed by a gunshot wound." The indictment contained but one count, which charged all the parties as principals in the homicide. The case made on behalf of the prosecution went far to establish that James St. John, one of the prisoners, fired the shot which killed George Furey, and that the other prisoners were aiding and abetting him in the homicide; while the Attorney General also submitted that the question, as to who the particular person was who fired the shot, was not a matter of much importance, as the prisoners would be guilty of the offence charged against them, if they were aiding and abetting the party, whoever he might be, who fired the shot which killed Furey. The learned counsel for the defendants did not rely upon a case of justification for the firing of that shot; but their case was that none of the prisoners fired that shot, and that none of the prisoners were aiding or abetting the person who did fire the shot; and independent of that the question of justification or no justification was left by the court to the jury, and they have by their verdict established the absence of any justification for the homicide; and to this portion of their finding no exception could be, or has been taken. The main inquiry for the jury was whether all or any of them were guilty;—James St. John as principal, and the others as aiding and abetting him;—or if some other person of their party fired the shot, then whether all or any of them were aiding and abetting such person in the commission of that act. The evidence clearly established that the body from which the shot was fired, and to which the prisoners belonged, had collected together and combined with one another for the common object and design of resisting and preventing by force and with the aid of fire-arms and other weapons, the Harbor Main people from going into the settlement of Cat's Cove; and in the conflict which ensued, some half dozen of shots were fired by the party to which the prisoners belonged, and that the death of George

Furey was caused by the last shot fired. It is a fact in this case, that is not and could not be disputed upon the evidence, that the fatal shot was fired by one of the party to which the prisoners belonged, and the question which remained was whether the prisoners were or were not implicated in the guilt of the person who fired the shot, supposing that the shot was not fired by any of the prisoners. The law upon this subject is thus laid down in *1st Russell on Crimes*, p. 27:—"The general rule is that all present at the time of committing the offence are principals, although one only acts, if they are confederates and engaged in the common design of which the offence is part"; and in page 29 it is laid down that "where there is a general resolution against all opposers, whether such resolution appears upon evidence to have been actually and explicitly entered into by the confederates, or may be reasonably collected from their number, arms or behaviour, at or before the scene of action, and homicide is committed by any of the party, every person present in the sense of the law when the homicide is committed will be involved in the guilt of him who gave the mortal blow."

Again in *Regina vs. Howell and others*, 9 Car. and P., p. 437, the law is thus laid down by Mr. Justice Littledale, citing Hawkins:—"Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, although some of them are out of view." In the present case the combination and confederacy amongst the body to which the prisoners belonged to carry out a common object, and design,—namely, to prevent by all means, fire-arms included, the Harbor Main crowd or mob from passing down to Cat's Cove—was established beyond all doubt or question, and also that the fatal shot was fired by one of that party; and the simple question which the jury had to determine was, whether the prisoners were aiders or abettors in the commission of that homicide. That being the question for the jury, I will now refer to the direction they received from the court upon that branch of the case. After leaving to them the question as to whether the person who fired the shot was or was not justified, and telling them that if they believed he was justified they should acquit all the prisoners, the charge proceeds to state "But if you should not arrive at that conclusion then will arise for your determination the second question, viz.: are the prisoners, or is any of them, guilty of the homicide? Upon which point I will inform you

that every person who was present at Cat's Cove when Furey was feloniously shot, and was then and there actively aiding and abetting the party by whom he was so shot, is equally guilty in law with the man who fired the gun. On this part of the case it is proper for me to observe, that if men at a distance from their homes, or without lawful excuse, are found mixed up with an unlawful assembly, their presence may of itself afford an inference to some extent of their guilty participation; but in this case it is obvious that no such inference can be drawn from the mere presence of parties at their own homes, where it is natural and proper for them to be, and therefore I advisedly say that those whom you would connect with the death of Furey must be proved to have been actively, I say actively, aiding and abetting in his homicide." In my judgment, after giving this question a most anxious consideration, and after a most earnest and laborious investigation of all the authorities bearing upon it, this was as full, as fair, and as favorable a direction in point of law, as could have been given, or as the evidence before the court warranted us in giving to the jury; and when that jury have in the language of the charge found that the prisoners were "actively aiding and abetting the party by whom George Furey was shot," I for one feel without further observation, that I would not be justified in point of law in disturbing their verdict, in a case in which a reflection of the faintest character is not made upon them in any form, of which, as a judge of this court, I could, in carrying out the due administration of justice, take any notice whatever, and where the direction to the jury is, as I am clearly of opinion it is, correct and proper upon the evidence before the court, and where the finding of the jury is sustained by the evidence. It has been suggested that, while this shot, if fired in pursuance of the common object and design of the Cat's Cove people, would involve in the guilt of the homicide all the prisoners, there was evidence upon which it should have been left to the jury to inquire whether that shot was fired in pursuance of that common object; or under circumstances which removed the prisoners from all participation in the act of the party who fired that shot. Let me, in the first place, ask—was not that question left to the jury in the broadest way upon the whole of the evidence on the part of the prosecution, and for the defence; and if the jury did not believe, upon that evidence, the guilty participation of the prisoners, how could they find, under the charge of the court, that the prisoners were then and there

actively aiding and abetting the party by whom George Furey was shot? There are no doubt, authorities to be found in our books, that where bodies of persons have engaged to carry out a common purpose and design, and where one of that body had separated himself from the rest of the body, and in an effort to carry out another and a different object from the original design, has committed the crime of murder or manslaughter, in which, as a matter of course, the parties to the original purpose and object were held not to be involved; but a brief consideration of these cases will shew that they are not analogous to the present case, and that these cases were decided upon evidence plainly shewing, in the party who committed the act, a departure from the original object and design, and that the commission of the act was for another and a different purpose, circumstances of which there is no evidence in this case. Thus in *Rex vs. Edmeeds*, 3 C. & P. 390, upon which my brother Robinson has relied—"If game keepers attempt to apprehend a gang of night poachers, and one of the game keepers be shot by one of the poachers, this will be murder in all the poachers, unless in the words of Baron Vaughan, "it could be shewn that either of them separated himself from the rest and shewed distinctly that he would have no hand in the act," and in that case two of the poachers were convicted with the one who fired the shot. In the present case there is no evidence, in my judgment, to shew distinctly or at all, that the prisoners would have no hand in the act of the party who fired the shot; that they in any way discountenanced or discouraged it, or that it was not in furtherance of and in carrying out the original object and design, that that shot was fired. In *Rex vs. Hawkins*, 3 C. & P. 392, which is another of the cases upon which Judge Robinson relied, it was held "that where a gang of poachers attacked a game keeper and left him senseless on the ground, and one of them returned and stole his money, &c., that that one only can be convicted of the robbery, as it was not in pursuance of any common intent." Park J. said in that case: "It appears to me that Williams is alone guilty of this robbery. It appears that there was no common intent to steal the keeper's property. They went out with a common intent to kill game, and perhaps to resist the keepers; but the whole intention of stealing the property is confined to Williams alone. They must be acquitted of the robbery." This case, in my opinion, illustrates, in the most clear and simple way, the distinction between the present case and the class of authorities in our books to

which it belongs; that persons combined together to carry out a common purpose are equally answerable for the crime which each of them may commit while they are so engaged, unless it be, as Baron Vaughan laid down, "distinctly shewn that the act was not done in furtherance of the common object and design, but in the accomplishment of another and a different purpose and design." Considering, then, the present case, under this view of the law, I would humbly ask was there a particle of evidence adduced to shew that James St John, or whoever else fired the shot which killed Furey, did not fire that shot in furtherance of the same common purpose and design with which the five or six other shots were fired, or a particle of evidence that it was fired to accomplish any other purpose or design, or from any motive or intention, other than the one under which the other shots were fired. Again, in *Tremearn's case*, 3 C. & P. 393, upon which Judge Robinson also relied with much confidence, in support of his opinion in this case:—"A smuggler, in a scuffle with the revenue officers shot one of his own comrades (upon a grudge of his own); the question was whether the whole gang was guilty of murder; and it was held that as it did not appear the gun was discharged in the prosecution of the purpose for which the party was assembled it was only murder in him who did it." This case is another striking illustration of the distinction between the present case and the class of cases to which it belongs, for it is evident that the ground upon which that case was decided was that it appeared the homicide, so far from being committed in furtherance of the common purpose and design of the parties, was committed to carry out a wholly different purpose and object, namely, to gratify the private grudge and malice which the party who fired the shot had against one of his own companions, and not against those in opposition to whom his party were combined. The statement *Russ. on Crimes*, 542, upon this case, is most important, and is as follows:—"And it was agreed by the court that if the revenue officer, or any of his associates, had been killed by the shot, it would have been murder in all the gang, and also if it appeared that if the shot was levelled at the officer, or any of his assistants, it would also have amounted to murder in the whole of the gang, though an accomplice of their own were the person killed. This case, while it established, what cannot be questioned, that where it is proved that one of a body combined for a common purpose, commits a homicide, not in furtherance of the common design, but to carry out a wholly

different object and purpose, the party alone who committed the act is guilty, and his companions are not involved in his guilt; yet, as an authority bearing on the present case, it goes to establish this position, that if the party who fired the shot which killed George Furey had, from any motive of his own, fired at one of his own party, he alone would be answerable for the consequences; but that in having fired it at one of the body to whom his party was opposed, and with whom they were in conflict, all with whom he was combined in the common object and design would be involved with him in the criminality of that act. The distinction which is apparent between the cases upon which I have been just commenting, and the present case, will, on a careful examination, be found to pervade all that class of cases to which they belong, and that they are manifestly distinguishable from the present case. What analogy have these cases to the present case? If the shot was fired by James St. John, or by any other member of the body to which the prisoners belonged, is there a particle of evidence to raise a belief, a conjecture, a mere surmise, in the minds of the court or jury that that shot was fired for any purpose whatever but in pursuance of the common design? If James St. John did not fire the shot, then the party who did so is carefully concealed; and if James St. John was the party who did fire it, it is not shown, as in the cases referred to, that he, or whoever else fired the shot, had any special private grudge against George Furey, or any motive to prompt him, any design to accomplish, any project to achieve, by taking his life, save the common one which prompted the other five or six of the party who fired on the Harbor Main mob,—and that being the case, every man who was combined in carrying out that common purpose, upon the authorities which I have referred to, is involved in the crime, even if they were not in view of the party who fired the shot, by which the life of George Furey was taken. Having referred to the law bearing upon this case, I must now observe on the course of the investigation which resulted in the verdict we are now asked to set aside. The case occupied six sitting days of the court; I never witnessed an inquiry that was conducted in a calmer or more dispassionate manner; an intelligent jury gave the case unremitting attention, the prisoners had the advantage of two able counsels who exerted themselves with an energy and zeal in behalf of their clients that every one who witnessed it must have admired; and I will say for myself, that throughout this case I have given

to it all that care, anxiety, and tenderness for the interests of the accused, which the painful position in which they were placed demanded; and it is after an inquiry so conducted that we are asked to set these proceedings aside, and to do that only on the ground that something more precise than the language of the charge might have been addressed to the jury. If we had been asked by counsel to amend the charge, which we deemed full and ample upon the evidence before the court,—if they had required us, after it had been delivered, to render it upon any point more precise, or suggested explanatory amendments, qualifications, or additions, to be made, the case might be different so far as such suggestions, if not acceded to, would afterwards appear to be of importance; but when that has not been done, and parties acquiesce in the charge and take their chance of a verdict in their favour, and the result is adverse to them, to allow them afterwards, to claim another chance on the grounds relied upon in this case, would be to establish a precedent fraught with danger to the due administration of justice. In *Blackwood vs. Gregg, Hays, 277*, it was ruled that,—“It is the duty of a party dissatisfied with a judge’s charge, at its conclusion to state his objections and propose amendments, that the judge may have an opportunity of correcting himself,—otherwise, such objections cannot be afterwards relied on”; and in the *Duke of Newcastle vs. The Hundred of Broxtowe in 1 Nev. and M. 609*, Park, J., in delivering the judgment of the court, in reference to the manner in which the judge left that case to the jury, said: “But we must receive with very great caution objections of this nature, for if we were to yield to them on all occasions in which we might disagree with some observations made on a particular part of the evidence, upon which it is the province of the jury to decide, we should seldom have any case which involved many facts brought to a termination. It is only in those cases in which we are satisfied that the jury has been led to a wrong conclusion, that we ought to interfere; and we cannot possibly say that they have been induced to form a wrong conclusion in this case.” I must say that I feel myself placed in that position in the present case, for I cannot discover any grounds to satisfy me that there was a misunderstanding of the charge on the part of the jury, or from which I could conclude that they were led to a wrong conclusion. In the minds of parties who had expected a different result, and who were therefore disappointed with the verdict, no doubt surmises, speculations and conjectures of misapprehension and mistake

may have arisen; but I would not, as a judge, be warranted in acting upon such grounds; for, in the language of Mr. Justice Cresswell, in *Strickland vs. Strickland*, 1 Nev. and M. 749,—“It would be extremely dangerous and highly injurious to the interests of justice, that new trials should be granted upon a speculative surmise, that the jury may have been confused or misled by the particular manner in which the judge frames his direction to them in point of law, or the order in which he presents the facts for their decision.” Upon all these grounds I am of opinion that the direction of the court to the jury was correct in point of law; that their verdict is consistent with the evidence laid before them; that a verdict so given ought not to be disturbed, and therefore that this application for a new trial ought to be refused.

No rule on this motion.

HON. MR. JUSTICE ROBINSON:

In this case the nine prisoners at the bar were indicted for the manslaughter of George Furey and were found guilty on the 3rd instant.

A motion has been made on their behalf for a *venire de novo*, on the ground that there was a mis-trial, because three of the jurors who tried the case did not possess the qualification prescribed by law; and also for a new trial on the ground of mis-direction and of the verdict being contrary to evidence.

To this rule the Attorney General shewed cause instanter.

A preliminary question has first to be settled, namely—whether in case of conviction for felony this Court has the power to order a *venire de novo* or a new trial.

I should be sorry to find that the Supreme Court of this colony did not possess the means of reviewing the verdict of a jury in cases of the greatest magnitude, even where life itself may be involved.

Every reason which is urged in favor of possessing the power to grant new trials in civil suits appears to me to exist with tenfold more weight when applied to convictions in criminal prosecutions.

Lord Mansfield declared that the trial by jury could not exist without an authority in the Court to correct the effect of erroneous verdicts by ordering new trials—*Bur.* The learned author of the commentaries states: “The maxim at present adopted is that in all cases of moment, where justice is not

done upon one trial, the injured party is entitled to another; nor can there be any doubt that this is a reasonable and salutary practice; if every verdict were final in the first instance it would tend to destroy this valuable method of trial; in the hurry of a trial the ablest judge may mistake the law and misdirect the jury. The jury are to give their opinion instanter, at least without separation, and the most intelligent and best intentioned men may bring in a verdict which they themselves, upon cool deliberation, would wish to reverse."—*3 Ste. Com. 603.*

In criminal proceedings there has been, as regards new trials as well as other matters, a gradual alteration in practice corresponding with the gradual amelioration of the law and of society. Thus, in the old books, we find it broadly laid down that no new trial can be had in any criminal trial—*R. v. Silver-toot*! By degrees new trials became first of occasional, and then of frequent occurrence in misdemeanours; but felony continued longer beyond the pale of such review, upon the theory that, if a rehearing were granted to the accused, it could not well be denied to the Crown; and then would be invaded that merciful maxim of law, that no man should be put twice in jeopardy of his life for the same cause; and formerly most felonies were capital.

Towards the earlier portion of the present century felonies were to a great extent divested of the blood-stained tinge which so inconsistently disgraced the criminal code of England, and now only a few offences are punishable with death, and with the reason the rule ceased—*cessante ratione cessat lex*."

In the case *R. vs. Russell, 3, E. & B.*, the late Lord Campbell made the following observation: "I, for my part, reprobate the recent speculations as to the propriety of granting a new trial after acquittals for felony and murder. If there be an improper conviction, it should be set aside; but I hope the same practice will never prevail in the case of an acquittal." And the words are remarkable; as showing how entirely that experienced judge deemed it a matter of course that in any case an improper conviction should be rectified; and the last text book has the following passage:

"The Court of Queen's Bench, when the record is before that court, will, in its discretion, order a new trial in cases of conviction for felony, where evidence has been improperly admitted, or where the jury have been misdirected."—*Arch. C. P., 15*, referring to a recent decision *R. vs. Scaife, 17, 2, B., 238.*

The Supreme Court of Newfoundland possesses within this colony all the powers of the Court of Queen's Bench in England; and therefore I am of opinion that it can legally order a new venire, or a new trial, in this cause.

Next arises the question whether the exception taken after verdict to the want of qualification in three jurors who were on the panel, is sufficient to justify the court in awarding a new venire.

I have examined a great number of authorities upon the subject, both in the English, the Irish and the Colonial Courts; amongst which, for the convenience of reference, I will name *Norman vs. Beaumont*; *Dovey vs. Dobson*; *E. of Falmouth vs. Roberts*; *R. vs. Sutton*; *R. vs. Sullivan*; *R. vs. Deleany*; *R. vs. Tremearne*; and I find one leading principle pervading every one of them, namely, that the objection must be taken by challenge, or at the earliest opportunity. In *Tremearne's* case, the objection was taken after verdict, but it only succeeded because the juror's name in that case was not upon the panel, and his want of qualification could not have been known, or excepted to sooner. I therefore feel constrained to say that this objection would have been a good cause of challenge; but after verdict it comes too late, and cannot now prevail.

I shall dispose of the remaining points together,—viz. the propriety of granting to these prisoners a new trial upon the grounds of mis-direction, and of the verdict being contrary to evidence,—I have bestowed much reflection and research upon this matter, and my mind has arrived at a clear conclusion that the prisoners are, in strict law, as well as upon every consideration of fairness and clemency, entitled to a new trial.

After an impartial review of, and giving due weight to, all the evidence in the cause, I am unable to assent to the first proposition of the attorney general, viz., that the Cat's Cove people had not a legal right to assemble as they did. I think it is plain enough that a bitter feeling was stirred up in that district, surpassing, in its acrimony, legitimate political difference; and I also think it proved that in 1859 some Cat's Cove men, at the instance of Charles Furey, whom they recently opposed, had offered some illegal obstruction to others; but I cannot say that there was anything whatever unlawful, under the circumstances proved in the case, in the few men of Cat's Cove assembling themselves at their own village, and arming themselves, for their own protection; whilst I altogether dissent from his second position that the Harbor Main concourse

was lawful; for, I think, it is clear, under the facts proved on both sides,—not merely on one, but on both sides—that the crowd which marched upon that settlement, and which the witnesses on both sides, by common consent, designate “a mob,” was an unlawful assembly; it possessed almost every feature that usually characterizes an unlawful assembly; it was composed of large numbers of men, collected from various parts, who had no lawful business in Cat’s Cove; its object was avowedly intimidation; it was calculated to endanger the public peace; it breathed threats of injury against the inhabitants of that settlement; its advent was regarded with terror by them; it was persisted in despite of earnest and reiterated remonstrances and entreaties; and it promptly proceeded to the perpetration of acts of violence.

And here I will stop for one moment to guard myself against misapprehension. Individually, I deprecate most strongly the use of fire arms without absolute necessity. In myself, I should prefer submitting to a large amount of wrong rather than have recourse to them; but I am here to declare the law, not to give effect to my own feelings; and I should not be justified in stating that the weak may not lawfully protect themselves against the physical power of a lawless multitude by the necessary use of a weapon which can alone equalize their positions and serve for their security. To deny that right would be to give direct encouragement and immunity to brute force, which would be as dangerous to the peace of society as it would be inconsistent with the law of the land.

In reference to the question of mis-direction, a glance at the evidence will be useful. The following facts seem to have been established by the testimony on both sides: That where the Cat’s Cove men were assembled with arms was on field on the north side of the road, near to which they had placed the barricade to bar further progress; that they had assembled there with a common object and common intent, namely, to resist by force the progress into their settlement of the Harbor Main mob; that it was immediately after the commencement of the affray that the guns were fired from this field, which had the effect of instantly dispersing the mob, repelling their progress and sending them away; and that by none of these shots was George Furey killed. It is clear, therefore, that the common object and common intent of the Cat’s Cove men, whether lawful or unlawful, were accomplished before Furey was touched.

William Furey states that after he had been wounded George had gone away towards home, and, after about twenty minutes, returned (possibly with the object of seeing his brother) to a field on the south side of the road, quite distinct from that in which the Cat's Cove men had assembled; and that, when there, he was shot by a man on the road. And Gorman, a Crown witness, states "the Cat's Cove people followed us to the edge of the field; I cannot say they followed us down the road." Now, this state of facts appears to me to establish that the scene of action of those who were assembled with a common intent was the field; that on that field they effected their common object; and from that field they did not, as a body, depart; indeed, it is the case of the Crown that one individual came along the road, and, standing on the road by himself, shot Furey. I desire these facts to be borne in mind for on them depends the question of mis-direction.

The words of the charge to the jury were: "All who were present at Cat's Cove when Furey was feloniously shot, and were then and there actively aiding and abetting the party by whom he was so shot, are equally guilty in law with the man who fired the gun." I think that direction is correct, and could not be misunderstood, if Furey had been unjustifiably shot in the field where the men were assembled with the common intent; but a very different question arises under the facts proven, and I conceive it to have been the duty of the Court to have taken care that the jury clearly understood it; and that question was: Were or were not those who had been seen with arms in their hands at a different place and at an earlier period, and to effect an object which had been accomplished—were they acting in concert with, and aiding, the individual who shot Furey in a distinct place, and at a later period, and after the common object had been attained? It is impossible not to see the importance to the prisoners of such an issue—it was not suggested at the trial. I own it did not at the moment occur thus clearly to me, or, so far as I know, to either of my learned brothers; and I may fairly assume that it was not apprehended or considered by the jury. I do not think the verdict of the jury is reconcileable with the evidence, except in one view, namely, that Furey returned when the mob had been dispersed and every danger had passed, and when there could be no necessity to justify his homicide; and a verdict of guilty against the man who shot him might be deemed unexceptionable; but the complicity of the others in that act is precisely

the point upon which I feel that the jury were left in the dark and on which they ought to have been clearly directed.

It may be urged that the charge was sufficiently general to embrace the particular view to which I have averted, and was correct, but I cannot accept that excuse; I do not question its correctness with reference to the transactions in the field, but I feel that it was deficient in respect to the affair on the road; its practical incorrectness arises from its being too general; the very essence of the prisoners' complicity in an act done by another is the common intent, and from the beginning to the end those words do not occur. It is of small avail that a judge's charge be etymologically accurate if it fail to impress upon the minds of the jury the image necessary to be there reflected; for all practical purposes it might, in such an event, as well be delivered in an unknown tongue.

The Court said there were only two issues; I think there were three; and the third a most important one, the importance of which may be best appreciated by reference to a few authorities.

In *Hawk, P. C., 101*, it is laid down that to make several parties implicated in the guilt of one, "the fact must appear to have been committed strictly in prosecution of the purpose for which the party was assembled."

So, where two men were beating a third in the street, and a stranger made an observation on the cruelty of the act, and one of them stabbed him, this was not murder in both, though both were present, and both were doing an unlawful act; for only one intended to do injury to the person killed—*3 C. & P.* In *Plumer's* case, one of a gang of smugglers, in a scuffle with revenue officers, shot one of his comrades maliciously, and it was ruled that "for as much as it did not appear that the gun was discharged in prosecution of the purpose for which the party had assembled, it was only murder in him who fired." In *R. vs. Hawkins, 8, 3 C. & P., 302*: The prisoners were out poaching; they beat a game-keeper and left him senseless; after they had gone a little distance one of them returned and robbed him; it was held that he alone was guilty of the robbery (although the others had so materially conduced to it), because the common intent for which they had assembled was a different one from the robbery.

In *R. vs. Edmonds, 3 C. & P., 309*, eight prisoners were charged with shooting one Mancey. The eight were out poaching, each being armed, when Mancey approached, the prisoners

pointed their guns and said they would shoot him, and one did fire and wounded him; their counsel submitted "that if the shooting of Mancey was not in pursuance of, but was beside the common unlawful intent for which these parties assembled, the only person who can be found guilty is the one who actually fired the gun; for, to make the whole party guilty, the act must be done strictly in prosecution of the purpose for which the party was assembled." From that position Baron Vaughan did not dissent; but, on the contrary, expressly declared that the intent was a question for the jury.

R. vs. Collison, 4 C. & P., 566: The prisoner and another man were together for the purpose of committing a felony by stealing. They were followed by two watchmen a short distance behind, with the view of apprehending them. The prisoner's companion stepped back and wounded one of the watchmen. It was held that the prisoner was not responsible for the act of his companion, if the two men had only the common purpose of stealing, and the violence proceeded from the impulse of the moment and without previous concert.

The like authorities might be multiplied indefinitely; and I think they prescribe the third issue which should be put to the jury in this case with reference to all except the man who fired the fatal shot, namely—Was Furey shot strictly in prosecution of the purpose for which the party had assembled? And in determining that question they should consider whether the mob had or had not then been driven back and gone away, and whether the common object had or had not been already accomplished before he was killed. The consideration of that issue might have materially affected the verdict against all but one; and, if so, it is manifest that the prisoners have not had a fair trial, although the omission was unintentional.

It was urged by the Attorney General that no exception was taken at the trial to the charge, and certainly authorities are to be found that in civil cases judges will be slow to grant a new trial for mis-direction, unless exception was taken to it at the time; but that is a question of practice and form which must never be allowed to overrule substantial justice, and ought not to prevent the Court correcting an error in a criminal trial into which it may inadvertently have fallen, and especially in one involving the momentous consequences to the prisoners at the bar, to whom, in my humble judgment, a new trial ought, as an act of justice, to be granted.

HON. MR JUSTICE LITTLE:

THE prisoners were tried before this Court on an indictment for manslaughter; the jury found them guilty, and acquitted two other prisoners who were included in the indictment. The counsel for the prisoners thereupon applied to this Court to set the verdict aside and issue a new venue, upon the ground of a mis-trial for an alleged want of qualification in three of the jurors who tried them, or grant a new trial on the ground of mis-direction on the part of the judge who charged the jury, and that the verdict was contrary to evidence.

The present jury law of this island requires that petty jurors for trial of cases in St John's shall occupy or possess a dwelling house of the annual rent or value of £10, or be possessed of a freehold of any value, within five miles of the Court House. The stipendiary magistrates are required to superintend the making up of the lists of all persons qualified to serve on juries and return them to the sheriff, to be summoned upon trials in the usual manner. Upon the trial of this case, each of the prisoners had the right by law to challenge twenty jurors. They exercised that right to the extent of challenging thirteen; and I presume they were then satisfied with the twelve jurors who were sworn to try the case, otherwise they could, and doubtless would, have challenged every one of them as they came to the book to be sworn. After the verdict an affidavit was presented to the Court setting forth that three of the jurors do not possess any freehold property, or pay an annual rent of £10 a year, but a less sum, namely, £8 a year, one of them saying that he does not consider his house worth more than that rental, while the other two make no statement of the "value" only of the rent they pay for their houses. It appears to me that it would lead to endless difficulties in the trial of causes if such applications were permitted to prevail after the proper time has passed for challenging jurors for want of the legal qualification, when that point could be tried in the ordinary way by triers. In *Kington vs. Groom*, 11 M. & W., 826, an application was made to set aside a verdict on the ground that the sheriff was directed to summon a jury from the body of the country, whereas the jurors who tried the cause were all persons residing in the town of Northampton, with the exception of two, who, however, were not on the jury list for the country, nor qualified to be so. Lord Abinger decided that the party ought to have taken objection at the trial, and

not be allowed to lie by and take his chance of a verdict.—There are many authorities to be found to the same effect. I am, therefore, of opinion that there is nothing in this and that there has been no mis-trial.

As to the application for a new trial, that raises a very important question as to the power of this Court to grant new trials in case of felony. It is laid down by Lord Kenyon in *6 T. R., 638*, that “in one class of offences, indeed, those greater than misdemeanors, no new trials can be granted at all.”

Such seems to be the principle recognized in all the old authorities. If a doubt arose as to the correctness of a conviction it was brought under the notice of the twelve judges in England, and the judge who tried the cause had thus the benefit of their opinion as mere assessors; and, if the verdict were not sustainable in their judgment, a pardon was recommended, and the Crown always complied with the recommendation. It appears, however, that a different principle and practice have been recently adopted by the Court of Queen's Bench in England in one case of felony, in which a new trial was granted, and although doubts have been thrown out by some writers on the correctness of that decision, it seems to me to warrant us in entertaining this application. In *Arch. P. & E., 154*, it is thus noticed: “But now the Court of Queen's Bench, when the record is before that Court, will, in its discretion, order a new trial in cases of felony where evidence has been improperly admitted, or where the jurors have been mis-directed.”—*Regina vs. Scarse, 17, 2 B., 238*. There is, doubtless, much convenience in this practice, for it enables the Court to do substantial justice without reference to the Crown for a pardon in case of an improper conviction; while the old doctrine, that no new trials in cases of acquittal for felony, is distinctly upheld. Under the Judicature Act this Court has the same jurisdiction in the administration of the criminal law as the Court of Queen's Bench, and by a local Act of our legislature all the criminal law of England applicable to our circumstances is in force in this colony,

The points then for consideration are—has there been any mis-direction to affect the validity of the verdict, and is the verdict sustained by the evidence? Baron Parke, in delivering judgment in the case of the *Duke of Newcastle vs. the Hundred of Braxton, 1, N. & M., 109*, upon an application to set aside a verdict for mis-direction, said: “But we must receive with

very great caution objections of this nature, for if we were to yield to them on all occasions in which we might disagree with some observations made on particular points of the evidence, upon which it is the province of the jury to decide, we should seldom have any case which involved many facts brought to a termination. It is only in those in which we are satisfied that the jury had been led to a wrong conclusion that we ought to interfere, and we cannot possibly say they have been induced to form a wrong conclusion in this." On the other hand, I am aware of the ruling in *Toulman vs. Hedly*, 2 C. & K., 162, that "in terms" the chief Baron says the "direction of the learned judge is not open to exception; in what precise sense he used those terms does not appear. The question left to the jury was certainly one capable of being misunderstood, and I believe the Court agree with me in opinion that for this reason the cause should go down again for a trial."

Applying the doctrine laid down in these cases, we are to say whether the jury has been led to a wrong conclusion by the judge's charge, or was the question left to them capable of being misunderstood? Let us briefly refer to the facts established in evidence by the witnesses on behalf of the Crown to enable us to form an accurate opinion as to the propriety or otherwise of the questions submitted to the jury, and as to whether they were led to a wrong conclusion. It appeared that a contested election for members to represent the district of Harbor Main in the House of Assembly of this island, was about to take place in that district in the month of May last; that party feeling ran high; that the result in favour of one party (Hogsett and Furey's) it was sworn depended on about thirty-six voters, who lived in a place called Salmon Cove, and who were, according to the government proclamation, to give their votes at a booth in a neighboring place about three miles distant, called Cat's Cove, which was a stronghold of the opposing candidates (Byrne and Nowlan); that threats previously expressed by some of the Cat's Cove people that they would make the Salmon Cove voters eat their votes, and other threats of the same menacing character, and a knowledge of the fact that at the previous election these voters were prevented from voting by force of the Cat's Cove and some Harbor Main voters, induced apprehensions of violence towards the Salmon Cove electors if they should go to vote at Cat's Cove; that the respected pastor of the parish, the Very Rev. Kyran Walsh, then requested Hogsett to apply to the Attorney General for

leave to open a booth at Salmon Cove, where the voters of that place might be polled without danger of violence; it did not appear that this request was complied with; the reverend gentleman then resolved to accompany the thirty-six electors of Salmon Cove, with a large body of the people of Harbor Main, numbering about three hundred in all, to Cat's Cove, to enable the thirty-six to give their votes to the candidates of their choice and return peaceably; he intimated his object to the people of Cat's Cove before hand, and the evening before the election they sent a note to him objecting to this course and intimating, as they said, a determination to defend themselves against the Harbor Main mob, &c, and if their voters in two other places named were allowed to go to the poll they would not interrupt the voters going to Cat's Cove; he then repeated his peaceable intention of going to Cat's Cove as before stated; accordingly on the following morning, being the polling day with the Harbor Main people, he accompanied the Salmon Cove voters to Cat's Cove to enable them to give their votes; it was proved that the body of people who accompanied him were without a weapon of any kind, except a walking-stick used by an old man named Devereux; that as they were passing through Cat's Cove, and about a mile from the polling booth, their progress was stopped by a barrier thrown across the public highway, and on the hill side of it the prisoners and several other Cat's Cove people, numbering in all from forty to sixty, had assembled to resist the advance of their opponents; that the prisoners and several others were there armed with sealing guns; that the priest, seeing the danger, went among the armed party to reason with them, and obtained a promise that the thirty-six Salmon Cove voters might pass with him; that he called out to these to come on and the rest to remain back; the main body did not appear to have heard him; the Salmon Cove voters were in the front and made a move ahead, when two guns were discharged, it would appear, in front of them; a rush was then made by the Harbor Main people at the fence on the hill side of the road, to get round their opponents and go round to the booth in that way; stones were now fired, some of the witnesses swore, first from the Cat's Cove people, and others for the defence, said from both sides, and others, from the Harbor Main side; the latter are, however, turned back by several of their number being shot down by the Cat's Cove people, who fired their guns at them as they went up the hill; one Harbor Main man, William Furey, is

left by his friends severely wounded on the field; his party are all retiring, pursued by the Cat's Cove people; his brother, George Furey, hearing that he is shot, leaves his friends, and, in making his way to where his brother William is lying—the latter swore that he saw James St. John take aim and discharge his gun at him from the end of Buck's house, where it appeared a number of the Cat's Cove men were at the time, and George Furey immediately fell mortally wounded and very shortly afterwards died from the effect of the shot; that the place where the shot is said to have been fired from was about one hundred and fifty yards from the barrier on the main road; that all the prisoners were on the field at some time of the conflict with guns, and were actively employed in resisting the advance of the Harbor Main people; that nearly all the latter had gone away homewards when George Furey was killed, and that the shot which he received was the last shot that was fired. These are the leading points which were sustained by the evidence of the Crown. Many of the statements made by the Crown witnesses were contradicted by the witnesses for the defence, whose evidence went to show that the Cat's Cove people were under apprehension of violence from the superior numbers of the Harbor Main people, and the threats they are said to have used against their opponents. I do not pretend to give a statement of the elaborate evidence taken on both sides, only sufficient for the purposes of the present argument. The jury were the judges of the evidence, and the result has shewn to which class of testimony they attach credence.

It was laid down by Judge Robinson in the charge to the jury, that "all who were implicated in the death of George Furey are guilty of manslaughter, unless the life or family, or dwelling house, of him who fired the shot, or the lives or families, or dwelling houses of those of his party in Cat's Cove, are shewn to your satisfaction to have been in danger from the conduct of the Harbor Main mob, and that it was necessary for their defence to use the gun by which George Furey was killed." Then they were told that if the justification was made out to their satisfaction their verdict ought to be "not guilty"; but if the justification was not made out, the next question put to them was "are the ten prisoners, or any of them, guilty of the homicide? Upon this point I will inform you that every person who was present at Cat's Cove when Furey was feloniously shot, and was then and there actively aiding and abetting the party by whom he was so

shot, is equally guilty in law with the man who fired the gun"; and again, "I advisedly say, that those whom you would connect with the death of Furey must be proved to be actively—I say actively—aiding and abetting in his own homicide."

While I do not hesitate to express my disapproval of several of the observations made by the learned judge in his charge, I am bound at the same time to say, after giving the most anxious and deliberate consideration to the subject, that it was impossible to have given a charge more favourable to the prisoners, both in point of fact and of law. The jury, by their finding nine prisoners guilty of manslaughter, and acquitting two others who had not guns on the ground, established by their verdict that there was no justification for the use of guns upon that lamentable occasion. It is equally clear that it was unlawful for them to assemble with fire-arms, in the tumultuous and riotous manner they did, to resist a body of electors who were quietly and constitutionally proceeding on the Queen's highway with a large number of their friends to the polling booth. But it has been urged that the jury should have been told in more explicit terms that unless Furey was shot in carrying out the original design of preventing the Harbor Main people from getting the Salmon Cove voters polled at Cat's Cove, only the man who shot George Furey was guilty of the homicide, and none of these who were actively aiding in driving them back would be implicated in the act.

"In order to render a person a principal in the second degree, or an aider or abettor, he must be present aiding and abetting at the fact, or ready to afford assistance if necessary; but the presence need not be a strict actual immediate presence, such a presence as would make him an eye or an ear witness of what passes, but may be a constructive presence. So, that if several persons set out together or in small parties upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him—some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favor, if need be, the escape of those who are now immediately engaged—they are all, provided the fact be committed, in the eye of the law, present at it, for it is made a common cause with them, each man operated in his station at one and the same instant towards the same common end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to insure the success of their common enterprise."—*1 Rus. on Crimes*,

22 Fost., 350. "If a fact amounting to murder should be committed in prosecution of some unlawful purpose, though it were but a bare trespass, all persons who had gone in order to give assistance, if need were, for carrying out an unlawful purpose into execution, would be guilty of murder. But this will apply only to a case where the murder was committed in prosecution of some unlawful purpose, some common design in which the combining parties were united and for the effecting whereof they had assembled, for unless this doth appear, though the person giving the mortal blow may himself be guilty of murder or manslaughter, yet the others who came together for a different purpose will not be involved in his guilt."—*1 Rus.*, 25 *Fost.*, 351. In illustration of these principles it is laid down in *1 Rus.*, 455, & *1 East.*, P. C., 359, that "where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, as by committing a violent dissension with great numbers of people, or going to beat a man or rob a bank, or standing in opposition to the sheriff's posse, they must, when they engage in bold disturbances of the public peace, at their peril abide the results of their actions. And, therefore, if in doing any of these acts they happen to kill a man, they are all guilty of murder. Put it should be observed, that in order to make the killing by any murder in all of those who are confederated together for an unlawful purpose, merely on account of the unlawful act done or in contemplation, it must happen during actual strife or endeavour, or at least within such reasonable time afterwards as may leave it probable that no fresh provocation intervened." Again, "where there is a general resolution against all opposers, whether such resolution appears upon evidence to have been actually and explicitly entered into by the confederates, or may be reasonably collected from their number, arms or behaviour, at or before the scene of action and homicide is committed by any of the party, every person present in the sense of the law, when the homicide is committed, will be involved in the guilt of him that gave the mortal blow"—*Host*, 352. "But, it must be observed, that this doctrine, respecting the whole party being involved in the guilt of one or more, will apply only to such assemblies as are formed for carrying out some common purpose unlawful in itself into execution. For, if the original intention was lawful and prosecuted by lawful means, and opposition is made by others and one of the opposing party is killed in the

struggle, in that case the person actually killing may be guilty of murder or manslaughter, as circumstances may vary the case, but the persons engaged with him will not be involved in his guilt, unless they actually aided or abetted him in the fact, for they assembled for another purpose which was lawful"—*Fost*, 353, 354.

In *1 Haw, P. C. C. 31, s. 52*, it is said it should also be observed that the fact must appear to have been committed strictly in prosecution of the purpose for which the party was assembled; and, therefore, if divers persons be engaged in an unlawful act, and one of them with malice prepense against one of his companions, finding an opportunity, killed him, the rest are not concerned in the guilt of that act, because it had no connexion with the crime in contemplation. In the smuggler's case, where one of the gang, in resisting an officer of the crown, discharged a gun and killed one of his own party, it was made a question whether the whole gang were guilty of this murder, and decided in the negative, because it did not appear from any of the facts found that the gun was discharged in prosecution of the purpose for which the party was assembled—*Fost*, 352. In the coal heaver's case (*1 East, P. C., 413*), when John Granger and six other coal heavers were indicted under the black act for feloniously shooting at one John Green, he being in his dwelling house, &c. Four of the prisoners fired at Green through the windows of his house; the other three were present when their companions fired, but used no firearms themselves. But all were assembled in a tumultuous manner before Green's house, which they attacked, he having rendered himself obnoxious to them as an official. They were all found guilty and executed; the judges being of opinion that every person present aiding and assisting is a principal in the second degree. In *2 Haw, 442*, it seems sufficient for this purpose that the person who does the fact is encouraged and emboldened in it from the hopes of present and immediate assistance from the abetter, whether he be within view of the fact or not. So, in *1 Chitty's Crim. Law, 256*, if several persons come to a house with intent to make an affray, and one be killed, while the rest are engaged in riotous and illegal proceedings, though they are dispersed in different rooms, all will be principals in the murder. And where many are engaged in the perpetration of a criminal act and one of them is guilty of murder in the pursuit of their common object, all who were engaged in the riot or disorder are principals in the second degree.—*1 Hale, 442*.

In *6 C. P., 652*, which was a case of duelling, Vaughan, J., states that "mere presence alone will not be sufficient to make a party an aider and abetter, but it is essential that he should by his countenance and conduct in the proceeding, being present, aid and assist the principals. There are some peculiarities in this case, and one is that four persons, two of whom were the prisoners, went on to the ground with Eliot (who shot Mr. Mirfin), and that neither of the prisoners was called upon to act as second. If, however, either of them sustained the principal by his advice or presence, or if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not say or do anything, yet if he was present and assisting and encouraging at the moment when the pistol was fired, he will be guilty of the offence.

Whether we view the conduct of the prisoners in confederating together with others and arming themselves to resist the Harbor Main people and the Salmon Cove voters in going to the polling booth, or in pursuing them after they had succeeded in driving the main body back by shooting down several of their number, I think it is clear that all this was done in furtherance of the common design which was carried out, the final and fatal result of killing George Furey when all his party had retreated. If any other motive for the act could be shewn than that influencing the whole proceeding—if it could be shewn to have originated in an old grudge or something unconnected with the common intent of all confederates, then it would have been proper to have placed that view of the matter before the jury so as to give the parties charged as aiders and abettors the benefit of it; but nothing of the kind could be urged upon the evidence. And it would not have been proper to put a merely speculative question to them not properly arising out of the evidence.

Upon the best consideration that I have been able to give the subject, I am, therefore, of opinion that the jury were not misled by the way the learned judge presented the case to them, and that they could not have misunderstood the questions submitted for their decision. And, as to the point of the verdict being against evidence, after a calm and impartial review of the whole circumstances, and with a thorough sense of the consequences of my opinion to the unfortunate and misguided prisoners at the bar—whose position I deeply regret as I am sure they must regret having been instrumental in taking away the life of a fellow-being—I feel myself constrained to

state that, in my judgment, the evidence fully sustains the verdict and that I see no ground to disturb it.

Attorney General for the Crown.

Messrs. Carter, Q. C., and O'Donnell for prisoners.

EX PARTE JOHN DAWSON ET AL.

1861, *December*. HON. MR. JUSTICE ROBINSON.

Habeas Corpus—Insufficiency of commitment—Warrant of commitment for re-examination of prisoners—Bail.

Where persons detained without any warrant of commitment on a charge of murder were brought up by a writ of *habeas corpus*, and it appeared by the return to the writ that the cause of detainer was a commitment for re-examination on a charge on oath of murder against the prisoners The court refused to discharge them out of custody and committed them to gaol, holding that such a return disclosed a legal cause of imprisonment.

THE sheriff returned on the writ as the cause of detainer a warrant of commitment for re-examination of the prisoners, charged on oath with the murder of one Mercer, which warrant was received by him on yesterday, and before receipt of the writ.

Mr. Pinsent moved that the return be filed, which was ordered accordingly.

Mr. Pinsent—I move that the affidavits returned with the certiorari into court be read by the judge, and a sight of them be granted to me.

Robinson, J.—If I see a necessity for looking at the depositions, I shall do so; but I am not prepared in the present stage of the proceedings before the magistrates to allow you to do so. Such a publication of the preliminary examinations might be prejudicial to the due course of justice.

Mr. Pinsent—I move that the three prisoners be called into court.

The Attorney General and Mr. Hoyles, Q.C., for the crown, opposed this, and submitted that such corporeal presence was not requisite, that they were constructively in court, the sheriff having returned that "he had them then and there."

Robinson, J.—It is not an inconvenient mode to dispense with the actual presence of the prisoners, if you have no particular object in having them produced. Your motion for discharge or bail can now be made as well as if they were really present.

Mr. Pinsent—I have been denied access to them, and I wish them produced, pursuant to the exigency of the writ.

Robinson, J.—Let them be called, then.

After a short time the three prisoners appeared.

Mr. Pinsent then objected to the commitment as insufficient, the time of the prisoners' first committal not being mentioned, and their detention might be unreasonable.

Robinson, J.—Does your affidavit not state that they were first arrested last Wednesday?

Mr. Pinsent then pressed the necessity of his seeing the depositions, that he might judge if there were adequate cause for the prisoners' committal, and urged that they should at any rate be bailed, citing authorities to show the power of the judge to bail in any case whatever.

The Attorney General objected to the sufficiency of the affidavit on which the habeas issued, and said its issue was irregular, and that no such writ should have issued in this case; for no habeas was grantable where the warrant on the face of it charged murder, as this did.

Robinson, J.—Mr. Attorney, you forget that when the habeas here issued there was no warrant; it was lodged with the gaoler afterwards. Can you except to the regularity of the writ after it and the return have been filed? It should have been a substantive motion in the first place.

Mr. Hoyles, Q.C., contended that the return to the writ, disclosing a legal cause of detainer, viz., a charge of murder, the judge would not according to precedent bail, as no particular circumstances were shown to exist; that it was unusual to bail pending an enquiry; that the depositions ought not, pending such enquiry, to be published; and that, as to denial of access of the attorney to the prisoners, it was an exercise of the magistrates' discretion, which the circumstances of the case if disclosed would justify.

Robinson, J.—This is an important matter, inasmuch as it concerns the liberty of the subject, and the operation and effect of that most important writ, a habeas corpus.

The grant by me of the writ in this case, under the circumstances detailed in the affidavits of Dawson, Brophy, and Mr.

Pinsent, was a matter of the clearest right. I could not have refused it without violating my duty as a judge, and depriving the three prisoners of the protection of a law which is rightly esteemed the magna charta of our liberties

That a fearful crime has been committed seems to be beyond question; and that it is the duty of the government and of the magistrates to use every exertion, consistent with law, to discover the perpetrators and bring them to justice is equally beyond question; but parties accused must in all respects be treated constitutionally, and must not be deprived of any protection which the law mercifully casts around them. No one can say in what position he may be placed by true or by false charges, and if the law is not administered irrespective of foregone conclusions, and without respect of persons, the condition of our people would indeed be deplorable.

The facts on which I granted the writ, which the Attorney General says ought not to have issued, were:—1, that the prisoners, residing in Bay Roberts, in Conception Bay, were there arrested on Wednesday last, were brought to St. John's and lodged in the gaol here on the same day; 2, that they remained in prison from that day to Friday, without being brought up for examination; 3, that no warrant or commitment to indicate the charge or cause for which they were imprisoned was lodged with the gaoler; and 4, that their attorney, Mr Pinsent, was denied access to them, or sight of the depositions against them, by order of the committing justices, Messrs. Carter and Simms. There may have been abundant and obvious reasons for withholding from a prisoner, pending a preliminary enquiry, the depositions of witnesses; but the fact of any person being imprisoned two days without any commitment to show the cause of his confinement, and of his being removed from his home in another district, were sufficient to justify me in complying with the request for a habeas corpus; but in addition to these facts was the unusual and apparently oppressive proceeding of preventing these men from seeing their attorney or having any assistance.

The first step which a man in trouble, and deprived of his liberty, naturally takes is to seek the assistance of his friends; and during a very long and extensive practice at the Bar, I never knew the access of an attorney to his client in prison denied, nor can I readily conceive a case which would warrant it. There is a plain distinction between excluding an attorney from the preliminary examination of witnesses, and excluding

him from the accused. I greatly disapprove of it on principle, and express myself strongly against it; but whilst I do so, I also distinctly declare my belief that in this case the magistrates were solely influenced by a desire to promote the ends of justice, and had no intention to oppress the prisoners.

It is lawful for a magistrate to detain and remand a prisoner for re-examination by a verbal order, but it is more usual, better and safer, as this case shows, to do so by a written commitment; for if the commitment which was lodged with the gaoler after the habeas issued had been lodged before, no habeas would have been granted.

The length of time for which a party may be detained for further examination varies according to circumstances, and twenty days sometimes elapse between the first arrest and final commitment.

The return now made to the writ, viz., a commitment for re-examination on a charge of murder, discloses a legal cause of imprisonment. I think no unreasonable time has elapsed. I think it is unusual, and would be very inadvisable, to bail the prisoners pending the magisterial enquiry, and I decline to do so, and remand them back to prison. (The learned judge referred to an analogous case, *Ex parte Krans, I B. & C.*, in which a similar decision was made by Lord Tenterdon and the rest of the court).

Attorney General and Mr. Hoyles, Q. C., for the Crown.

Mr. Pinsent for the prisoners.

1861, *December*. BRADY, C. J.; LITTLE, J.; ROBINSON, J.

Insolvency—Receiver of voyage—Fish maker or curer—Insolvency Act 19 Vic., cap. 14—Who is a “receiver” within the meaning of the Act.

Under the provisions of the Insolvency Act 19 Vic., cap. 14, the “fish maker or curer” is not a receiver of the voyage within the meaning of the Act.

IN this case Mr. Walbank showed cause against a rule for a non-suit obtained by the Attorney General in the Central Circuit Court, and I transferred the cause into this court, in order that the three judges might have an opportunity of considering the question together, being one of the first impressions arising upon our last Insolvent Act. The plaintiff was the servant of a person named Butler, at the fishery, and the defendant was the maker and curer of their fish. The plaintiff not being able to obtain his wages from Butler, brought an action against the defendant, in whose possession the fish remained, to recover from him the amount of his wages, as the “receiver” of the voyage under the 19th Vic., cap. 14. He proved that he had fairly earned the amount he claimed as wages; that his employer, Butler, was insolvent, and submitted that upon these grounds he was entitled to follow the fish in the defendant's possession, and recover the amount from him as the “receiver” of the voyage. The Attorney General, for the defendant, called for a non-suit upon the ground that the fish maker or curer was not a “receiver” of the voyage under the Act, and that he had an undoubted right to retain the fish until his lien upon it for curing it was satisfied, and that neither the plaintiff nor any one else had paid or tendered to him that amount. A verdict was taken for the plaintiff, subject to this objection, upon which we have now to decide. After a most careful consideration of this case, in which we have regarded the effect of our decision in every point of view, in order that we should establish a just and sound rule for similar dealings and transactions in future; we have come to the conclusion that the fish-maker or curer is not a “receiver” within the Act in respect of fish in his possession as such fishmaker, and we are, therefore, bound to make the rule for a nonsuit absolute.

Mr. Walbank for plaintiff.

Attorney General for defendant.

1861, *December*. HON. MR. JUSTICE LITTLE.

Contract—Statute of Frauds—Consideration, what is a sufficient?
—*Practice—Rule nisi.*

One James Brenton was indebted to the plaintiff for current supplies, and failing to pay for same the plaintiff attached his boat and craft, which he afterwards released upon the defendant undertaking to become liable for the payment of the debt in annual instalments. One of the said instalments were paid, whereupon the defendant refused to pay the further instalments on the ground that there was no sufficient consideration to sustain the contract.

Held—The agreement was not within the statute of frauds.

IN this cause a rule nisi was granted to set aside the verdict for the plaintiff and enter a nonsuit upon the point reserved on the trial, that there was no sufficient consideration to sustain the contract on which the action was brought.

It appeared in evidence that one James Brenton was indebted to the plaintiff for current supplies in 1858 in the sum of £66 3s. 5d.; that failing to pay it, the plaintiff attached his boat and craft, and at the request of the present defendant he agreed to release the property attached, and did release it upon the defendant undertaking to become liable for the payment of the debt by instalments of £8 a year. The defendant then signed the following memorandum:—

[COPY.]

For and in consideration of a debt of sixty-six pounds three shillings and five pence currency, due by James Brenton to Richard Willey, I, the undersigned John Paul, do hereby promise and engage to pay to the said Richard Willey the sum of eight pounds annually until the same debt is fully satisfied and paid. The first payment to be made on the 20th September, 1859, and the other annual payments to be made in merchantable fish at the current price of the Harbor.

Burin, 23rd October, 1861.

his
JOHN X PAUL.
mark.

Witness,
WM. HOOPER.

It is understood that of the 21½ containing green fish, weighed to-day, and priced 7s. per quintal, shall, when cured, produce, as dry fish, more in value. Richard Willey agrees to allow for it, as agreed before me.

23rd Oct., 1858.

WILLIAM HOOPER.

According to this arrangement, the first instalment was paid by defendant, and he resists paying any more upon the ground stated.

There are two questions to be considered—first, is this an original contract, not within the statute of frauds, and if not, is there a sufficient consideration disclosed in the written memorandum to sustain the contract under the statute? The plaintiff had in his possession property of his debtors, and in consideration of his relinquishing that, and his attachment against him, the defendant assumed the place of the debtor with the additional advantage of obtaining forbearance in the payment by yearly instalments.

The principle is thus laid down in 1st Addison of Contracts, page 47, "A contract or promise of a third party may yet be an original contract not within the statute. If the plaintiff, for example, has a lien upon the goods and chattels of his debtor in his possession, or if he holds securities for the payment of his debt, and is induced either to give up his lien upon the goods, or to part with his securities upon the faith of a promise, made by the defendant, to pay the amount of the plaintiff's claim thereon, the promise so made is not within the mischief intended to be provided against by the statute of frauds, although the amount promised to be paid as the consideration or inducement for the abandonment of the lien or the surrender of the securities, may be the subsisting debt of a third party due to the plaintiff, and the performance of the promise may have the effect of discharging that debt. In *Edwards vs. Kelly*, 6 M. & S. 204, where the plaintiff had distrained upon his tenant for rent in arrear and afterwards delivered up the goods and chattels to the defendant for the use of the tenant, upon the faith of an undertaking, signed by the defendant in the following terms: "We, the undersigned, hereby agree and undertake to pay to Thomas Edwards (the plaintiff) all such rent as shall appear to be legally due to him from Edward Kelly, tenant, &c., up to the 25th day of December, 1815." It was held that the defendants were liable under their undertaking, and that it was not within the mischief intended to be provided against by the statute. "The landlord having distrained the goods, held them in his hands as a pledge for the rent, the debt in respect of such rent was for the time suspended, and the promised founded upon the relinquishment by the landlord of his lien upon the goods was an original independent contract, and not a mere promise to answer for the debt of another."

The analogy both in the facts and the principles involved in this case, and the cause under consideration, appears to me to be complete. The plaintiff has a lien on the property of his debtor, having taken possession of it under attachment for his debt; it was a security in his hands for its payment; he abandons this security and enters into a new original independent contract upon a new consideration with the defendant for the payment of his claim on his debtor,

In both cases the consideration appearing on the face of the memorandum was a debt already due by the original debtors, and not within the statute of frauds, it was competent for the plaintiff, to shew by parole evidence the whole of the circumstances constituting the transaction as they are not in consistent with the memorandum.—*Roscoe 614.*

I am therefore of opinion, upon this ground, that there was a sufficient consideration for defendant's promise, and that the verdict ought not to be disturbed. In this view it is not necessary that I should offer any observations on the second question, though I do not hesitate to say that the manner in which the case was first presented to the court, that is, without evidence of the whole circumstances, which was very fairly afterwards admitted with the view of obtaining a decision thereon, would have obliged me to dispose of the case upon partial evidence, by a regard to that question alone.

Let the rule be discharged.

M. W. L. O'Donnell, counsel for plaintiff.

Mr. T. J. Kough, counsel for defendant.

1862, *January*. HON. SIR F. BRADY, C. J.

Currency Act of Newfoundland—18 and 19 Vic., cap. 8, interpretation of—British sterling—Sterling—Currency.

The word "sterling" in 18 and 19 Vic., cap. 8, is not to be construed as importing British sterling, or sterling money of Great Britain, or lawful money of Great Britain. When the word "sterling" is used alone and without such additions as "British sterling," or "sterling money of Great Britain," or words of the like import, it denotes an inferior and depreciated value in Newfoundland, or, in other words, what has been called local or Newfoundland sterling.

There are three standards of value governing local pecuniary contracts and monetary obligations in Newfoundland; first—an obligation in currency, which is discharged by payment in dollars, at five shillings currency each; secondly—an obligation to pay, say £100 British sterling or sterling money of Great Britain, which is discharged by payment in dollars at 4s. 2d. each, or £120 currency; and thirdly—an obligation to pay £100 "sterling," which has hitherto for some thirty years been discharged by payment in dollars, at 4s. 4d. each, or £115 7s. 8d. currency.

THIS cause comes before the Court upon a special case agreed upon by Mr. Carter, on behalf of the plaintiff, and by the Attorney General, on behalf of the Crown, and it is one of grave and vast importance, not so much to the plaintiff, but to the public, because the monetary transactions and obligations of the government are to a large extent involved in the decision of it, and private rights and liabilities may be seriously affected, as it is impossible to know to what extent private contracts and other documents exist, the construction of which may be governed by the final judgment in this case. In determining the matter in litigation, I am restricted to the statements in the case and to such matters as I am bound to take judicial notice of. The question raised in this case depends upon the interpretation to be given to the "sterling" in the Act of the local legislature, 18 and 19 Vic., chap. 8, sec. 1, passed in 1855. The plaintiff contends that that word is to be construed as importing British sterling, or sterling money of Great Britain, or lawful money of Great Britain, while the law officers, on behalf of the Crown, insist that when the word "sterling" is used alone and without such additions as "British sterling," or "sterling money of Great Britain," or words of the like import, it denotes an inferior and depreciated value in Newfoundland, or in other words, what has been called local or Newfoundland sterling. It cannot, I apprehend, be questioned that there are three standards of value governing local pecuniary contracts

and monetary obligations in this country; first—an obligation in currency, which is discharged by payment in dollars at five shillings currency each, or its equivalent, under the Currency Act; secondly—an obligation to pay, say £100 British sterling, or sterling money of Great Britain, which is discharged by payment in dollars at 4s. 2d. each, or £120 currency; and thirdly—an obligation to pay £100 “sterling,” which has hitherto, for some thirty years, been discharged by payment in dollars at 4s. 4d. each, or £115 7s. 8d. currency. With respect to obligations in the language mentioned in the first and second classes, no real practical difficulty has ever arisen as to their discharge, for a debt in currency was discharged by payment in currency; and as to those in British sterling, for example, the reserved salaries, they were discharged in British coin, or in its equivalent, dollars at 4s. 2d. each. If the salary in the present case had been granted in the language which clearly distinguishes these two classes, this case would not be heard of; but the plaintiff contends that the word “sterling” alone imports the same standard of value as the words “British sterling,” or “sterling money of Great Britain”; while on the part of the Crown it is contended that when that word is used alone it denotes, by custom and usage in this country, a depreciated amount or value which is or may be called local or Newfoundland sterling, and that the monetary obligation created thereby is discharged by payment at the rate of £115 7s. 8d. currency for every such £100 sterling. It cannot be denied that custom and usage does in very many cases alter the primary and ordinary sense and meaning of words, and that the same words represent or describe distinct and different things, numbers and values in different localities, and the instances are of frequent occurrence in which they are recognized and established by law. The law is thus stated in a work of high authority, *Addison on Contracts*:

“Custom and usage have a powerful influence upon the interpretation of contracts, and determine to a great extent the meaning of the words used therein. If by the known usage of trade, or by custom, a word has acquired in respect of the subject matter of the contract, a peculiar sense and meaning, different from the ordinary proper sense and meaning, parol evidence is admissible to show that the parties used the word in its customary trade acceptation, and not in the ordinary popular sense. Thus, the word *thousand* in certain trades comprehends a larger number of units than it does in its ordinary

acceptation. In the herring trade, for example, *six score* herrings go to the hundred and *sixty* to the thousand; and parol evidence is admissible, consequently, to show that the word *thousand*, when applied to herrings in the contracts of herring dealers, means twelve hundred. In a lease of a rabbit warren, parol evidence was admitted to show that by the custom of the country, where the lease was made in taking the account of the rabbits on a rabbit warren, the numbers were computed at one thousand dozen to a thousand, and the word 'thousand' in a lease, as applied to rabbits, was consequently construed to mean one hundred dozen or twelve hundred."

I might adduce many other instances in which a like departure from the popular and ordinary meaning of words has been recognized and adopted in legal decisions in England; and in this country the word "fish" has been, by a decision of a special jury in the Supreme Court, construed to mean in mercantile contracts cod fish only, by reason of the force of custom and usage. The word "shilling" in England represents a certain value there and a lesser value here. The words "a British shilling" represent a certain value in this country, and the word "shilling" a lesser value; and may not a pound British or a pound British sterling represent a certain value here, and a pound sterling a lesser value.

The word "sterling" is well known to us in the various proceedings in this Court and in the Supreme Court of the colony, and pounds sterling in all our writs, judgments and other documents, expressing sums of money, invariably denote so many pounds of the value of £115 7s. 8d. currency, and not £120 currency. If an attachment be issued to recover a debt of £100 currency, the debt is sworn to as so much sterling, at the rate of dollars at 4s. 4s., the writ is marked for that amount sterling, and if that amount be paid in dollars at 4s. 4d., or in British sterling at the same rate, the attachment will be discharged; but if not, and the case goes to trial and the debt of £100 currency be established in evidence, and the jury find a verdict for that amount, if a judgment be afterwards entered up, that judgment follows the same rule, and is entered for so much sterling. If a *fieri facias* be afterwards issued upon that judgment it commands the sheriff "of the goods, chattels, &c., of C. D. (defendant) — pounds, — shillings, — pence, sterling, which A. B. (plaintiff), lately in our Supreme Court, recovered against him," &c. The same course is adopted if a *capias ad satisfaciendum* issued instead of a *fieri facias* and a

party be arrested under it. A similar proceeding takes place where a *capias ad respondendum* issues. The £100 debt in currency is reduced to sterling at the same rate; for that amount sterling the writ is marked. If the defendant when arrested pays that amount he is discharged from custody; if the case proceed to trial and judgment, the same proceedings precisely take place as in the case of an attachment, and if an execution should be issued upon the judgment payment to the amount in the depreciated or local sterling satisfies the demand, although it is marked for so much pounds, shillings and pence sterling. Thus, under the course of the proceedings of our courts, a judgment for £100 sterling is satisfied by payment of £96 3s. 1d. sterling money of Great Britain. This practice of the courts of justice, which has prevailed for nearly thirty years, does appear to me to demonstrate most strongly the fact that in Newfoundland the word "sterling" does not *ex vi termini* denote the same amount as the words "sterling money of Great Britain," or "British sterling," or words of similar import, but that, as interpreted, understood, recognized and acted upon in the courts of law, it denotes a lower amount or lower standard of value, and proves that, at least to this extent, this word has acquired in this country a sense and meaning other and different from its import and meaning in England, and such being the case for so long a time in the proceedings in the courts of law in this country, it would seem to favor the conclusion that it should be regarded as the legal import and meaning in this country of the word "sterling" when used alone.

I shall now advert to our local legislative enactments, and show how far they have tended to influence the judgment at which I have arrived in this case. As I have never before had occasion to investigate this or any other matter involving questions respecting our currencies, I have been compelled to go through a laborious examination of the whole legislation of the colony since the establishment of a local legislature in 1853; and the result of that enquiry has been to satisfy my mind that the three standards of value governing, as I have already said, local monetary obligations, have been always borne in mind in framing enactments in relation to the collection, appropriation and disposition of the public monies of the colony. On reference to these enactments it will be found that when "British sterling" is intended, plain and unmistakeable language is used; when "currency" is intended, that that word is used; and lastly, when the depreciated or local sterling is in-

tended, the words "sterling" or "sterling money," or the simple designation "pounds," without the addition of "British sterling," or "sterling money of Great Britain" or "currency," are used to denote the value intended; and I think it will appear plain and manifest that these words "pounds" and "pounds sterling" are used indiscriminately throughout this legislation of some thirty years to denote the depreciated or local sterling. The first enactment of our legislature, in the year 1833, was to provide for the performance of quarantine; and by the 5th section it imposed a penalty of £100 "sterling money of Great Britain," and in several subsequent sections the words *sterling money as aforesaid* are used. Again, in the first enactment for raising a revenue, the 4th Will. 4, c. 1, s. 3, it is enacted "That all sums of money granted or imposed by the Act, either as duties, penalties or forfeitures, shall be deemed, and are hereby declared to be, sterling money of Great Britain." And again, in 1858, in providing for the retirement of the assistant Judges Des Barres and Simms, who had always received their salaries in British sterling under an Imperial Act, the language of the legislature is equally clear and plain in the 21 Vic, c. 22, s. 1, which enacts "That they shall each receive, for the term of their respective natural lives, as a retiring allowance, the sum of £275, in sterling money of Great Britain, out of the public funds of the colony." It will also be found that when the legislature intends to designate currency equal precision of language is observed, as will be found in the several enactments throughout the same period fixing the rate of pilotage by expressly fixing them at so much "*currency*"; and also in the 13th Vic, s. 1, and the 14th Vic, s. 1, providing the form of the treasury notes therein mentioned, these words are used, "The bearer of this note is entitled to receive at the treasury the sum of — *pounds currency*." With these exceptions it will be found that in every other enactment respecting the public monies of the colony, and in relation to its appropriation to every branch of the public service, the words "pounds" and "pounds sterling" are used indiscriminately, and import the same standard of value, viz., local sterling.

The case before me erroneously states that the general acts of appropriation have always granted the money thereby appropriated as pounds generally, without distinguishing whether such pounds were currency or sterling, but the fact on examination will be found otherwise; and I am bound to notice and act upon the local enactment, and not upon mistakes in this

case. Thus, in grants for roads, to give a few instances. the words "pounds sterling" are used in 6 Will. 4, c. 15; 1 Vic., c. 21; 2 Vic., c. 2;—"pounds" only in 6 Vic., c. 4, and 7 Vic., c. 9. In grants for the civil contingencies of the legislature, which have a particular bearing on the plaintiff's rights in this case, the 4 Will. 5, c. 25; 5 Will. 4, c. 17; 2 Vic., c. 11, and 6 Vic., c. 25, have the words "pounds sterling," while the 5 Vic., c. 10; 7 Vic., c. 16; 8 Vic., c. 16, have the words "pounds" merely; and the same will be found in the enactments for raising loans, appropriations for the civil service, for education, &c., &c. Moreover, the word "sterling" will be found in reference to monies mentioned in the enactments for these several purposes, to be used one year, omitted the next, inserted the following, and so on; and also, it will be found used in enactments for one or more of these purposes, and omitted in enactments in the same session for the other purposes. A similar examination of the various enactments authorising the raising of loans for public purposes will shew that the amount to be raised is stated indifferently in them as "pounds" and "pounds sterling"; and also, these enactments in which the word "pounds" alone is stated, show that that word implies, by the form of the debentures given in the several schedules to these acts which contain the words "pounds sterling," that the amount or value was intended as if the words "pounds sterling" were used in the granting part of such enactments. Thus, in the 6 Will. 4, c. 14; 6 Vic., c. 23; 7 Vic., c. 3, c. 7; 9 and 10 Vic., c. 1; 10 Vic., c. 2; 12 Vic., c. 19; 14 Vic., c. 8, and 17 Vic., c. 4, the amount authorised is specified in "pounds" merely, while the debentures on which that amount was to be raised specify "pounds sterling"; demonstrating, as it appears to me, that the addition or omission of the word "sterling" to the word "pounds" did not, in the mind of the legislature, alter or effect the standard of value it intended to denote. And in this respect the enactments would be analogous to those in the Imperial Parliament, with this difference, that the word "sterling" in the latter would denote British sterling, while in our acts it would denote Newfoundland or local sterling. Thus, if an Act of the Imperial Parliament gave £100 or 1000 "pounds" a year to an individual, or for any object, these words would give precisely the same amount as if the Act said 100 or 1000 pounds "sterling money of Great Britain"; and from the review I have given of the enactments in this country, I think a precisely similar rule is

deducible, and that where the words "pounds" or "pounds sterling" were used the same amount or the same standard of value, viz., depreciated sterling, was intended; and where either of the two standards of value were intended appropriate expressions were used to denote them. This view of these enactments, in my judgment, clearly proves that these words in our local laws are used indiscriminately, and are, in fact, synonymous. The admission then in the case that all the general Acts of appropriation, such as supply, roads and contingency Acts, have always been discharged at the rate of £115 7s. 8d. to every pound so granted, equal to dollars at 4s. 4d. for every such "pound"; and as I have shown that such grants were indifferently in pounds sterling or in pounds merely, and that such words in the enactment of the legislature are, in truth, synonymous, it establishes, in my opinion, during that long period, a uniform custom and usage to discharge all monetary obligations as are in "sterling" at the rate of dollars at 4s. 4d. sterling each, or £115 7s. 8d. currency for every £100 "sterling." I will now consider this subject in reference to the salary of Master-in-Chancery, upon which the plaintiff first raised this question in the year 1855, as appears by his correspondence with the Receiver General of that period, appended to this case. I have already shown that in many instances grants for the contingent expenses of the legislature were made in "pounds sterling." The Act under which the plaintiff claimed his salary as Master-in-Chancery (the 18-19 Vic, c. 19) granted four thousand one hundred and seventy-nine pounds sixteen shillings and five pence, without the word "sterling," to be applied, &c., as follows:—Clerk in the Council, £150; Master-in-Chancery, £125; and so on to the several officers and other persons named therein, to the number of fifty or sixty, for their respective services until the above mentioned sum of £4,179 16s. 5d. was exhausted, and then, as the case admits, the claims of those persons were discharged by payments at the rate of dollars at 4s. 4d. each, plainly shewing that the paymaster knew that he was authorised to pay £4,179 16s. 5d. at that rate and no more, and that the recipients knew they were to receive the same amount and no more amongst them in discharge of their several claims. The plaintiff's objection to the rate at which his salary under this Act was paid, had not the colour of the word "sterling" to sustain it, for that word does not appear in the Act. The same course has always prevailed under Acts for those expenses containing the grant

in "pounds sterling," in both cases the appropriations have always been discharged at the same rate, as the case admits, the plaintiff raising the objection, certainly in 1855, which, however, produced no alteration, but fixed him with express notice of the value in which such appropriations were discharged; the local sterling was received in payment of the salary, and no further steps appear to have been then adopted by the plaintiff, and I own I am unable, under these circumstances, to discover any arguable ground upon which to rest a claim to have the salary of Master-in-Chancery under that Act, in which the word "sterling" is not to be found, paid in sterling money of Great Britain. I will now refer to the Act upon which the present question arises—the 18-19 Vic. c. 8, passed 1855. The first section of that Act grants to Her Majesty "such a sum of money as will suffice to pay unto the several and respective persons appointed to the several offices in the government of this island, as are hereafter mentioned, the following salaries and allowances in sterling money, that is to say, unto," &c., &c. The right given by this Act to the plaintiff is neither more or less than that which is given to the several other officers named with him, and I am unable to discover on what grounds I am to give a different interpretation to the words "sterling money" in this Act from what I have already given to the words "pounds sterling" in the several enactments for the various branches of the public service to which I have referred; or how I could hold that these words import any other standard or value than local sterling. I will return to one of the Acts for the contingent expenses of the legislature, which contains the grant in *sterling*, and I apprehend it will be clear that there is no sound distinction between it and the Act under which the present claim is preferred. Take the 5 Will. 4, c. 14, in 1835, or the 6 Vic., c. 25, (1843), and the grants are in these terms, "That there be granted to Her Majesty, &c., the sum of three thousand two hundred and fifty-nine pounds, six shillings and one penny, *sterling*, to be applied, &c., as follows: to the speaker, two hundred pounds," and to the other officers, enumerating them, until the amount is exhausted.

It is, I conceive, impossible to discover any valid distinction between the language used in these enactments, and I am, therefore, bound to give to them the same interpretation and hold that the standard of value under the Act I have to decide upon in this case is local sterling, unless there be some other

enactments to control that construction. Two Acts were relied on for that purpose; the first passed in June, 1854, the 17th Vic., c. 5, entitled "An Act to declare the rates in currency at which British gold and silver coins shall be a legal tender"; and it enacts that the gold coin of the United Kingdom, called a sovereign, should be a legal tender at the rate of one pound four shillings currency; and the 19th Vic., cap. 10, which revives and continues the former Act for one year, and it also, by the proviso in the first section, declares "that nothing contained in this Act shall affect contracts payable in sterling money entered into before the passing of the said in part recited Act, and before the passing of this Act." As I understood the argument based upon these enactments, it was this, that they in effect declared that "a pound sterling" in this country should be thereafter equal to 24s. currency; and this position I have recently seen stated by Mr. Justice Little in a letter addressed by him upon the 18th January, 1859, to the Governor upon this subject, and which, with other documents relating to it and just printed by the House of Assembly, were sent to me. Judge Little's letter contains this paragraph—"By the Currency Act of 1854 the sovereign was legalized and made current at twenty-four shillings currency, and the Currency Act of 1856, continuing that rate, expressly declares that a pound sterling shall be equal to twenty-four shillings currency. We, therefore, claim to be paid at that rate." I cannot concur in the views thus expressed, or in the argument founded upon these enactments. The first enactment does not contain the word "sterling" at all, but merely says that a British sovereign shall be a legal tender in discharge of demands in currency at the rate of one pound four shillings—that is, in other words, a British sovereign, which is "*one pound sterling money of Great Britain*," shall be equal to 24s. currency; but it does not declare that "a pound sterling" in this country shall be equal to 24s. currency. So far for that enactment. The only part of the second enactment in which the word "sterling" occurs is the proviso I copied above, and how it can be said that it *expressly declares* that "a pound sterling" shall be equal to 24s. currency, with all respect, I must say I cannot comprehend. In my judgment, the words "contracts payable in sterling money" in that proviso do not at all apply to contracts payable in sterling money of Great Britain, for I cannot see how an enactment to make a British sovereign equal to 24s. currency can affect the rights of parties to contracts where

the obligation is in sterling money of Great Britain. Suppose a case where a tenant holds his house under such a contract, say at a rent of £100 a year, British sterling; the tenant knows he must pay, and the landlord knows he is entitled to receive, 100 sovereigns, or one hundred pounds sterling money of Great Britain, or its equivalent in currency, at the rate of 24s. to the pound, and how the enactment, without the proviso, could affect such a contract I am unable to discover.—These words “payable in sterling money” would rather appear to contemplate and thereby recognise contracts payable in local sterling, in order to prevent parties who might otherwise, on the ground of the sovereign being made equal to twenty-four shillings, attempt to exact payments under such contracts at that rate. However this may be, it is not now of much importance, as both the Acts were temporary Acts and have expired. In their stead the 19 Vic., c. 11, was passed, and, amongst other provisions by the second section, it enacts that “the British sovereign shall be equal to and a legal tender for one pound four shillings of the present current money of this colony”; and the 10th section contains this enactment, “And whereas, by this Act, one pound of *British sterling money* is hereafter to be represented by one pound and four shillings currency, according to the respective rates or value of the several coins hereinbefore mentioned, and at which they are, by this Act, fixed and determined, and to be hereafter a legal tender; and whereas there exist leases, bonds, debentures, and other monetary obligations voluntarily entered into by the parties thereto previous to the passing of this Act, reserving rents and other monies, payable in, and setting forth the payments therein expressed to be made, shall be payable in sterling or sterling money of Great Britain; and it therefore becomes necessary to declare that the provisions of this Act are not intended in any way or manner to affect such leases, bonds, debentures, or other monetary obligations. Be it, therefore, enacted and declared that nothing in this Act contained shall extend, or be construed to extend, to affect any lease, bond, debenture, or other monetary obligation, made and entered into before the passing of this Act, wherein the rent received or money payable thereunder is expressed to be payable in sterling or sterling money of Great Britain; but the same shall be and remain subject to the same legal interpretation and construction in every respect as the same would by law have been subject to provided this Act had never been

made, anything herein contained to the contrary notwithstanding."

The operation and effect of this clause is, in my judgment, to render this enactment, which was relied on as favorable to the claim of the plaintiff, very adverse to it. It its recital it states that whereas "one pound of. *British* sterling money" shall be equal to twenty-four shillings currency, advisedly and carefully using the words "British sterling"; and then it enacts that all rents, &c., and other monetary obligations entered into previous to the passing of the Act, where such rent or money payable under such obligations is expressed to be payable in sterling or sterling money of Great Britain, shall not be affected by that Act, but the same shall be subject to the same legal interpretation and construction in every respect as the same would by law have been subject to, provided that Act had never been passed—thus obviously, throughout the section, in my judgment, marking the distinction which the legislature has always made between "sterling" and "sterling money of Great Britain," and leaving monetary obligations in "sterling money" or local sterling, such as the plaintiff's, precisely as they stood before the passing of that Act. The same distinction is manifest in the Acts granting retiring allowances to the two late assistant Judges, DesBarres and Simms, and to Mr. Ayre. The language used in the 21 Vic, c. 22, s. 1, for the allowances to the assistant Judges, is £275 "in sterling money of Great Britain"; for the allowance to Mr. Ayre, £175 "sterling" in the very next Act. Could stronger proof be given of the distinction which marks our legislation and its meaning in the use of these words, "sterling money of Great Britain" and £—"sterling," than is derived from these two enactments? two Acts passed co-temporaneously, and when I ask myself why this distinction should exist, I have only to look to previous legislation respecting these two classes of officials and I find it explained that the salaries of the Judges were paid in British sterling, or in dollars at 4s. 2d., while that of Mr. Ayre was paid at the rate of dollars at 4s. 4d., or, in other words, in local sterling; and the legislature, therefore, in granting the retiring allowances, maintained the same distinction, and gave to the Judges their allowances in British sterling, and to Mr. Ayre his allowance in local sterling. The Solicitor General relied upon two cases decided in our courts, in which rent reserved in "sterling" was declared by the verdicts of juries to be satisfied by payment at the rate of dollars. These were

Brine vs. Tobin and *Winter vs. Row*, and, with respect to the first of these cases, the judicial records are not forthcoming, and I shall not, therefore, observe further upon; and, with respect to the second, while it confirms the opinion which in this case I have formed quite independent of it, as all the proceedings in that case came judicially before myself. I feel that I ought upon this occasion to state them, in order that it may be seen why the Court declined to make that case to any extent a ground for its decision, although they relied upon on behalf of the Crown. The action in that case was an action of debt for rent brought in 1855 upon a lease bearing date the 3rd October, 1846, in which the rent was thus reserved "at the yearly rent of £255 *sterling*," and in that action the plaintiff claimed to recover, as arrears of rent, the difference between payments which he had received for a number of years at the rate of dollars at 4s. 4d. and what he insisted he was entitled to receive, payment at the rate of dollars at 4s. 2d. each. This was the substantial question in the case, and in directing the jury in that case I told them that they were bound to hold the defendant liable to pay the rent in British sterling, unless they were satisfied upon the evidence that universal usage had in this country affixed a different meaning to the term "pounds sterling" from their ordinary import and meaning. The jury, which was a special jury, found a verdict, which they reduced to writing in these words: "The jury found the rent named in this lease to be payable at the rate of four shillings and four pence sterling for the dollar." Upon the application for the plaintiff's counsel, Mr. Robinson, (the plaintiff in this case), the jury were polled and each of them declared he found for the usage. A motion was afterwards made for a new trial, on which I granted a rule returnable in the Supreme Court upon two grounds: 1st—as to the evidence of usage; and 2nd—as to the admission of certain parol evidence; and, upon argument, we thought the case of such importance that we ought to allow a second trial, and we set the verdict aside. The case was never again brought before the Court, and, therefore, I do not rely on it as a binding decision.

It has been, however, urged with great confidence on the part of the plaintiff that, notwithstanding the custom and usage which has prevailed in Newfoundland, the words "sterling" and "sterling money" have a known, settled, established meaning, viz., sterling money of Great Britain or lawful English money, which local usage cannot affect or alter; and, un-

doubtedly, it does, at first, seem to be a bold and strong measure to extend the meaning of these words to any other than sterling money of Great Britain, their primary, ordinary and popular meaning. I have, however, found authority for doing so under circumstances very analogous to those under which the question in this case has arisen. Prior to 6 Geo. 4, c. 79, an Act for assimilating the currency of Great Britain and Ireland, the value of English and Irish money was different to this extent as is stated in one of the cases, "To reduce Irish currency to its value in English money you must deduct one-thirteenth of the sum in Irish currency, and the result is the value in English money; and if to an amount in English money you add one-twelfth, it gives the value in Irish currency."—Upon this state of facts numerous cases were contested in the Courts of England and Ireland as to the meaning and operation of the word "sterling" when added to amounts in Irish contracts, and there are numerous decisions, in the Courts of both countries, establishing that Irish contracts for so much "sterling" or for — pounds — shillings and — pence "sterling" meant Irish sterling, on the ground that the word "sterling" applies both to English and Irish money, although they are of different values, and this view is sustained in some of these decisions upon the express ground of the meaning attached to the word "sterling" in Ireland by custom and usage. Thus in *Ladbroke vs. Biggs*, *Batty's Reports*, 619, it was held in the Court of Queen's Bench in Ireland, in an action on a bill of exchange, that the bill was payable in Irish currency, notwithstanding it was drawn for £500 sterling; in that case counsel argued as in the present,—“The bill is payable in British currency, for it draws for £500 *sterling*. The proper primary meaning of the word “sterling” is the current coin of the realm according to the true standard—*1 Blask. Com.* It means lawful money of England; there is no sterling in Ireland, but the Irish pound is only a denomination for convenience.” The argument could not be put more forcibly, and nothing could shew more clearly how analogous the position taken in that case was to the position taken by Mr. Carter for the plaintiff in this case. Counsel on the other side in that case answered that argument thus: “If the argument on the other side derived from the use of the word “sterling” were to prevail, then every Irish inland bill in which the word is used would equally be payable in British currency. In *Sproule vs. Legge*, 1 B. & C., 16, and 2 D. & Ry., 15, evidence was received

that in Ireland the word "sterling" meant Irish currency. It is an ambiguous word, and may import either English sterling or Irish sterling, as appears in the case of *Picardo vs. Macaulo*; 4 B. & C., 886, and Bushe, C. J., in delivering the judgment of the Court said, in reference to the argument derived from the word "sterling" "That argument would prove too much, at least it would prove that all former bills and securities in Ireland for money sterling (which is almost all), though Irish in all other respects, ought to have been paid in English currency, which is contrary to all experience"; thus putting the answer to the argument upon custom, usage, and, as his lordship said, experience. Again, in *Neville vs. Ponsonby*, 1 Ir. Law Rep., 217, Chief Baron Woulfe, in delivering judgment, goes even farther than is necessary to go in this case. Speaking of the words "sterling," current and lawful money of Great Britain, he said: "I admit that these words, particularly the words 'lawful money of Great Britain,' in their popular signification (even in Ireland), and as used out of Ireland, would seem to import that the rent was to be paid, not in the currency of Ireland, but in that of England. But I think the words 'sterling' and 'lawful money of Great Britain,' as used in Irish instruments of contract, have acquired the same import as the words 'lawful money' generally, or 'lawful money of Ireland' There is no doubt, and it is not disputed at the bar, that these words 'lawful money of Great Britain' have acquired, and have had impressed upon them this signification, in all Irish contracts made within the last century—our courts of justice have acted upon this understanding, and have given efficacy to bills, bonds and warrants of attorney, in which money was described in these terms, as if they imported Irish and not English currency—they did so deliberately and uniformly." The views thus expressed by his lordship were confirmed by all the other members of the Court, thus proving what a powerful influence usage and custom have in altering the primary meaning of words even stronger than the words "sterling."

Upon all these grounds I am of opinion that the plaintiff has failed to establish a right to recover in this case, having been paid his salary in local sterling, or at the rate of £115 7s. 8d. currency for every £100, that being the rate in which all grants or appropriations made by the legislature in the same terms as those used respecting the plaintiff's salary, or in the synonymous terms, have been uniformly discharged for nearly

thirty years; and I must, therefore, pursuant to the leave for that purpose reserved in the case, non-suit the plaintiff.

Mr. Carter, Q. C., for plaintiff.

Mr. J. Hayward, Solicitor General, for the Crown.

ROBINSON v. THE QUEEN.*

1862, *January*. BRADY, C. J.; LITTLE, J.

Currency Acts of Newfoundland—18 and 19 Vic., cap. 8, interpretation of—British sterling—Sterling—Currency.

The word "sterling" in 18 and 19 Vic., cap. 8, is not to be construed as importing British sterling, or sterling money of Great Britain, or lawful money of Great Britain. When the word "sterling" is used alone and without such additions as "British sterling," or "sterling money of Great Britain," or words of the like import, it denotes an inferior and depreciated value in Newfoundland, or, in other words, what has been called local or Newfoundland sterling.

There are three standards of value governing local pecuniary contracts and monetary obligations in Newfoundland; first—an obligation in currency, which is discharged by payment in dollars, at five shillings currency each; secondly—an obligation to pay, say £100 British sterling or sterling money of Great Britain, which is discharged by payment in dollars at 4s. 2d. each, or £120 currency; and thirdly—an obligation to pay £100 "sterling," which has hitherto for some thirty years been discharged by payment in dollars, at 4s. 4d. each, or £115 7s. 8d. currency.

THE hearing of this case was proceeded with. It was an appeal from the judgment of the Central Circuit Court. Mr. Carter, Q. C., was for the plaintiff, and the Solicitor General (John Hayward, Esq.), for the Crown, in the Court below.—(The present Attorney General took no part, having been formerly retained by the plaintiff).

Mr. Carter, Q. C., and the Hon. R. J. Pinsent, now appeared for the plaintiff on appeal; and Mr. Whiteway (the Solicitor General being absent) for the Crown.

* In this case which was an appeal from the Central Circuit Court from the judgment of Brady, C. J., the judges, Brady, C. J., and Little, J., differed, and from their judgments there never was any appeal.—*Vide Robinson vs. The Queen, Supreme Court cases, July, 1865.*

Mr. Carter opened.

The learned counsel said that the question involved in this case was as to the construction of the word "sterling" in the local statute 18 and 19 Vic., cap. 8, as applicable to the payment of the plaintiff's salary as a Judge of the Supreme Court—some contending that it was payable at the rate of four shillings and two pence sterling to the dollar, and others at the rate of four shillings and four pence. The judgment of the Chief Justice of this Court, given when sitting alone as the presiding Judge of the Central Circuit Court, was a long and deep one. It exhausted all the bearings of one view of the case, and presented the whole in a new aspect. With it, however, the appellant was not satisfied, upon the grounds stated in the papers before the Court.

The appellant contends that the judgment is based upon a legal usage, the existence of which he denies. The parties were bound by the terms of the special case, and it included everything which must have been considered necessary to enable the Court to come to a right conclusion; but a usage of trade, or any conventional custom, had been altogether excluded, because the question arose upon the terms of a statute to which the strict legal meaning was to be attached, and only as appeared by the case to be affected (if at all) by the practice of payment under the statute of the local legislature; and, upon the argument in the court below, the counsel on both sides were confined to this view, except so far as the Solicitor General referred to *Winter vs Row* and *Bland vs. Tobin*.

Chief Justice—And the practice of the Court in entering up its judgments and suing out process.

Mr. Carter—Yes, but nothing beyond. (Cites from *Archbold's Practice*, 442, as to practice of Court in dealing with special cases). The judgment would appear to be based on the existence of a usage creating three standards of value, known as "currency," "sterling" and "British sterling" simply. We contend there is no such thing as local or Newfoundland sterling, and that whatever may have prevailed at any time in derogation of the law will not bind any one as to the payment of his salary. If any such practice prevailed it was wanting in all the requisites of a valid usage, being uncertain and not uniform or consistent; and did such a usage exist at all, it would become a question of great importance how it could affect the coin of the realm, an Act of parliament, or a proclamation of the Crown, and change the known legal import of

I have just cited, after reciting the Imperial Act 5, 6 Vic., "To amend the laws for the regulation of trade with the British possessions abroad," and that "by virtue of which divers duties thence before imposed by various Acts of Parliament of the United Kingdom, upon divers goods and merchandize imported into Newfoundland, have been repealed or diminished, and have failed to produce the annual sum of £6,550, so assigned and set apart as aforesaid" for the Governor, Judges, &c., it enacts that from and out of the nett proceeds of *all duties* levied within the colony, there shall be deducted every year a sum not exceeding "*the said amount of £6,550, (viz., £6,550 British sterling), to be applied in and towards the maintenance and support of the Governor, the Judges, Attorney General and Colonial Secretary in the manner provided by the 2 & 3 Will. 4, c. 78.* The effect then of this Act was to make this sum of £6,550 British sterling, a first charge upon the whole revenue of the colony, instead as it was before this Act, only upon so much thereof as was collected under Imperial Acts, and to be deducted from the nett proceeds of all such duties before the local Legislature could deal with, or appropriate such revenue. Acting upon the authority given by the 2 & 3 Will. 4, the local Legislature has by the 18 & 19 Vic., c. 8 & 9, repealed the enactments of the 5th Geo. 4, and other Imperial and local enactments so far as respected Governors and Judges, *thereafter* appointed; it reduces the salaries of the Governor and of the Judges *prospectively*; it assumed control over the sum of £6,550, so far as it could, but it did not, and could not affect *existing* incumbents, of whom I alone remain, and my present position is just this—that my salary is the first charge upon the whole revenues of the colony, to be liquidated before the local government have control over one shilling of that revenue, and if that revenue dwindled down so that the nett proceeds amounted to only £1,200, which, of course, I only state to exemplify my argument, that sum should, under the law of the land, be handed over in discharge of my salary, irrespective of the claim of every other servant of the Crown in this colony. I have made this statement to shew how unfounded in this respect are the reasons against my judgment, and also to shew that I have not the slightest interest in the questions raised in this case. As to all that is contained in the reasons on the subject of usage and custom, the existence of which, it is said, I assumed, and based my judgment upon such assumption, I will merely say that I did nothing of the kind. But applying, to the best of my judgment, the law of

ment that a grant in "pounds" was discharged by the payment at four and four. If it was intended to draw any distinction by the latter Acts, it would be expressed. The construction contended for by the Crown had not been acquiesced in by the legislature. It was always a sore subject, hotly contended for; and yet, on a case stated and to be found in the journals of 1850, the Attorney General of England, Sir J. Romilly, and the Solicitor General, Sir A. Cockburn, gave opinions adverse to the existence of a local sterling. The records of the Court show no such custom acquiesced in. (Cites *Blader vs. Thomas* and *Hiney vs. Gaden*, select cases, Supreme Court, which showed that it was not recognized by the merchants then).

Chief Justice—They did not differ much in their evidence in *Winter vs. Row*, where nearly every merchant from Riverhead to Magotty Cove was produced in evidence, and all concurred in recognizing local sterling payments at four and four.

Mr. Carter had no doubt that if they were brought now it would be the same, they were so much mixed up with transactions of that sort.

Justice Little—Do they charge their foreign correspondents at the rate of four and four pence?

Mr. Carter—No; they charge twenty per cent. In *Duncombe vs. Beck*, select cases, Judge Brenton distinctly laid it down as law in cases for rent reserved by lease that "law money of Great Britain" and "sterling money" were synonymous and of like meaning. The case of *Winter vs. Row* showed that it was a subject of contention then. The verdict was set aside, but the grounds are not given and it is not relied on here.

Chief Justice—No; certainly not.

Mr. Carter then referred to Judge Little's correspondence with the Governor on the subject.

Chief Justice—I think you have no right to go into the papers.

Mr. Carter—I only do so because your lordship refers to part of Judge Little's letter.

Judge Little—Be kind enough to read that part of the judgment, and see if it is a substantial part and incorporated with it. Contemporaneous history and matters of public notoriety may be properly taken notice of.

(Counsel then read the extract from the decision).

Judge Little—I think in that view you have a right to refer to the letter and justify your own interpretation by it. If used for one purpose it may be for another. Mr. Whiteway objects to, and Mr. Carter supports, the admission.

The Chief Justice—If I took that extract from a newspaper to specify an argument, would you say that all that newspaper contained would form part of the judgment or be used one way or the other? I put it simply to show the argument I addressed myself to meet. I used it, if used by the counsel for the plaintiff, as his own language, which in effect it was, and put in plain and convenient terms there.

Judge Little—As the Chief Justice differs from me you cannot use it. But you have had my opinion, which is that you may use the letter as if it were a book from the library or a report of a trial here, say by Mr. O'Donnell, for instance, the Chief Justice having made use of it in his decision. To exclude it would debar you from making the same use of it that he has done. I am quite of opinion, however, according to authorities, that you may also refer to it as matter of contemporaneous history, although not legally cited cases, and that it was properly used in the judgment of the Court below.

Mr. Carter—I doubt if it ought to have been referred to in the judgment, not being in the special case, and it does appear that his lordship has not based his opinion upon it, but only referred to it as something that occurred during the agitation. An extract from a newspaper being read the whole article could be made use of.

The learned counsel proceeded, citing from *Blackstone*, 277, as to the prerogative of the King in regard to coin. By statute coin must be of a certain sterling value. The sovereign is twenty shillings by law, and our local statutes meant the British sovereign and no other. The learned counsel then cited the cases mentioned under the third head of the appellant's reasons, to show that where the meaning of a term is plain and unequivocal, and *a fortiori* where the law annexes a particular meaning no evidence can be admitted to show a different sense, and *a multo fortiori* no custom could prevail against an Act of Parliament.

The Chief Justice—Before you go further I am disposed to do this, viz., to permit you to read the letter of Judge Little as, by permission of the Court, you would the opinion of counsel. There is no ground in point of law for admitting it, but I will withdraw my objection to its being read and allow the opinion of Judge Little to operate to the extent I have mentioned.

Judge Little—I need not say I differ as to the reason for the admission—that it is not as an opinion of counsel might

be read, but as of right from being introduced into the case by the Court below.

Mr Carter read the letter, and referred to the Currency Act, 19 Victoria, cap. 11, mentioned in the letter. That Act, counsel contended, recognized no distinction between "sterling" and "sterling money of Great Britain," and all contracts previously entered into were left to their construction in law. No question could arise after that and the former Currency Acts as to the value of the pound sterling; for if there was even a doubt about it, it was set at rest by this statutable declaration.

The Chief Justice remarked that Judge Little's letter spoke of the "pound sterling" being by those Acts declared current at twenty-four shillings currency. It was not so. The coin "British sovereign" was.

Mr. Carter submitted that the letter referred to the substance of the Act, and was accompanied by a clause which contained the extracts in full. Here was a salary payable in sterling or at equivalent rates. The judgment of the Court below set out that part of the Currency Act, 19 Victoria, cap 11, which says "Whereas one pound of British sterling money is hereafter to be represented by one pound and four shillings currency."—Now, the claim in the present suit arose "*hereafter*"; and further on in the same extract it was apparent that the reservation in regard to then existing bonds, leases and other contracts spoke indifferently, and without drawing any distinction between "sterling" and "sterling money of Great Britain." It used the disjunctive "or," not "and," which latter might have raised a question. Another point was that, if the position of the Crown be correct, the plaintiff says he ought to have his salary paid in *dollars*, and this was the original of the practice. Some dollars are now worth five shillings and three pence, payment of which would place him in a better position. Lastly, any other construction than that contended for by the appellant would be in violation of the prerogative of the Crown, which, by proclamation and statute, had declared a conventional usage. As to the cited cases which recognized an Irish sterling as distinguished from a British, he was not aware how that took its rise; but certain it was that it was a rate recognized by law, and Baron Woulfe admitted that there was no distinction between "sterling" and "lawful money of Great Britain."

The Chief Justice—His judgment, relying upon the usage, goes further than mine, and I have never seen any decision

coming up to that. Those I have cited are only some of many. There are more recent ones to be found in *Blye's Parliamentary Cases*, which were with regard to settlements executed in England charging Irish estates with the payment of money. And the question was: In which sterling was it payable?—the decisions turning upon the point: What was the *substantial* contract—English or Irish?

Mr. Carter—As to the practice of the Court in taking verdicts the juries give all their verdicts in currency, and the mode of rendering them was only to give effect to the intention that they should be paid in currency. If they were given in sterling, we contend they would require to be liquidated in current money of the realm. The requisites of a usage were all wanting to control the plain and unequivocal meaning of the term “sterling” if such a usage could prevail at all.

Mr. Whiteway for the Crown:—He concurred with his learned friend Mr. Carter in the wish that the full and elaborate judgment of His Lordship the Chief Justice, pronounced in the Central Circuit Court—a judgment upon this vexed question which appeared to have been read with general satisfaction, which had exhausted all arguments upon the subject, and which was another evidence of the depth of research and legal ability for which His Lordship was proverbial—had set this question at rest. But he differed from his learned friend in his first objection, when he alleged that that judgment was based wholly upon the existence of a usage; although, had it been so, he contended, that there was ample disclosed in the special case and in the cases cited in argument, especially *Winter vs. Row*, to warrant the Court in concluding as to the existence of a usage by virtue of which a debt payable in “sterling” was liquidated by a payment in dollars, or other coin, at the rate of 4s. 4d. to the dollar, or £115 7s. 8d. currency to the £100 sterling. By the 11th paragraph of the special case, it was admitted that colonial duties, since the establishment of a local legislature (1832), payable in “sterling,” had always been paid at that rate. In all the appropriation Acts—as the Road, Supply and Contingency Acts—the same rule had been followed. It appears also that in 1825 the value of the dollar was calculated at 4s. 4d. sterling, and by Royal proclamation was so established, and there was no authority to show that previously a different sterling value had been fixed for the dollar; and in the case *Winter vs. Row*, a jury, after hearing the evidence of a very large number of the pri-

cipal inhabitants of the city—merchants and others—had given a verdict to the effect that such a usage did exist; and although that verdict was set aside it was upon other grounds, and the finding of the jury upon the question of usage was undoubtedly correct.

But, without any reference to the usage, the term "sterling" in the 19th Vic., cap. 8, was defined by other Acts of the local legislature, as stated in the paragraph of the special case above referred to—for there it was admitted that the local Revenue Acts imposing duties "in pounds or parts of pounds generally, without distinguishing such pounds as sterling or currency," contained a special clause "that all sums of money *granted* or imposed either as duties, penalties, forfeitures, or otherwise, by *such or any Act or Acts* of the General Assembly, should be deemed and declared to be in sterling money of Great Britain, and should be taken and paid in such sterling or foreign coins as at the time being they were received in payment of colonial duties in this island, and under these Acts duties have always been at the rate of 4s. 4d. to the dollar, or £115 7s. 8d. to the £100." It is only necessary, therefore, to ask at what rate duties were paid at the time of the passing of the 19th Vic., cap. 8; and finding that to be at the rate of 4s. 4d. to the dollar, the meaning of the term in that Act is ascertained and the rate fixed.

The light dues, payable under a local statute, having been paid at the rate of 4s. 2d. to the dollar from 1843 to 1849, so far from negativing the existence of a usage was an argument in favor of it, for it would seem that at the latter period a change had been made and that, without any alteration of the law, clearly showing that up to that time the dues at 4s. 2d. had been erroneously collected.

The payment of the Governor, Chief Justice and other officials under local Act 6 Vic., cap. 13, commonly called the "Reserved Salaries' Act," at the rate of 4s. 2d., is another argument in favor of the Crown. These salaries were actually secured by the Imperial Act 2 & 3 Will. 4, cap. 78—and the Act 6 Vic., cap. 12, does not repeal the former, but merely provides out of what fund, viz., out of the revenue of this colony, those salaries should be paid. The term "sterling" in an Imperial Act can have but one meaning, viz., British sterling, or dollars at the rate of 4s. 2d.; and, therefore, these salaries being secured by Imperial Act, were rightly paid at that rate—hence the reason for the opinions of Sir J. Romilly and Sir

A. Cockburn, referred to in this case; very different, however, was the local Act 19 Vic., cap. 8, under which this claim was preferred, for it repealed the Imperial Act and fixes the applicant's salary at a certain amount "sterling," the meaning of which term in this island is very different and is defined generally by usage, and in this case, by the Bevenue Acts before referred to.

The cases cited of *Bladstone vs. Thomas*, and other cases from the select cases, Supreme Court, did not touch the question, being only authorities to shew that it has often been ruled, that a tender of Spanish dollars at 5s. each was not a legal tender in discharge of a promise to pay in "British sterling."

The letter of Mr. Justice Little and the documents annexed thereto did not form part of this case, and the reference thereto in the Chief Justice's decision did not import them into the case. Reference had only been made by the Chief Justice to an opinion in that letter expressed by Judge Little as coinciding with the arguments used by Mr. Carter, and neither the letter nor the documents annexed could legally be taken into consideration.

There were sufficient authorities referred in the judgment of the Chief Justice to shew that the term "sterling" was not always constructed to mean "British sterling," but may be altered by usage or custom, and to that judgment and the other cases therein cited he would refer the Court.

The Act 19 Vic., cap. 11, commonly called the Currency Act, had no bearing on this case, it merely fixed the value of certain coins in the discharge of currency debts, and the Act did not provide as to the discharge of a "sterling" liability.

There was no ground for the appellant contending that he had not been tendered actual dollars at 4s. 4d., and, therefore, was entitled to recover—for the Crown only contended that appellant was entitled to £650 sterling, payable in the current money of the island at the rate of 4s. 4d. to the dollar, and *not in dollars*.

The learned counsel cited from *Blackstone's Commentaries*, p. 70, and contended that the question of prerogative did not arise for here the distinction must be taken between altering, by usage the value of a coin—and the changing by usage of the meaning of a term "sterling." The alternation in the meaning of a term, as in this case, by usage, is no violation of the prerogative of the Crown.

The allusion of his learned friend Mr. Carter, to the practice of the court in taking verdicts was unfortunate for his client, for it was the well-known practice to receive verdicts in currency, change them into sterling by calculating at the rate of 4s. 4d. to the dollar, in that sterling the judgment was entered the costs having been taxed in *sterling* under the rules of Court, and the judgment was satisfied by a payment in current money, changing the judgment debt, which of course included the costs, from sterling to currency by calculating at the rate of 4s. 4d. to the dollar.

Mr Pinsent, addressing the Court for the appellant, in reply, introduced his argument by an expression of the confidence which he felt in applying for reversal of the decree of the Court below, although His Lordship the Chief Justice had himself delivered that judgment. He believed that His Lordship's first impressions were with the position taken by the appellant, and such impressions were said to be generally correct and might it not be possible; the learned counsel suggested, that in the endeavour to avoid their possible effect in prejudice of the Crown reasons foreign to the special case, and for which the Crown itself had not laid the foundation, may unconsciously have operated upon His Lordship's judgment, and influenced his decision. He was sure His Lordship would be as open to further argument, and, if he saw reason to change his opinion, to conviction in favour of the plaintiff, as if he had now for the first time heard the case as the Chief Justice of this Court on appeal.

Chief Justice—Certainly, Mr. Pinsent, I should not hesitate to alter my judgment if I saw good reasons for a reversal. I would not wish any but a correct decision of mine to go before the Queen in Council.

Mr. Pinsent—I am sure of that, my Lord, and there would be nothing derogatory in your Lordship's reversing a decision of your own; it would only be a further evidence of the high judicial character which in you is so generally valued. The counsel of the Crown was almost wholly relieved of any responsibility in this case, for there was after the judgment of the Court below little or nothing further to be urged. His learned colleague had taken up and supported the appellant's "Reasons for appeal," in order; and he taking rather a different course, would, with all submission, review His Lordship's judgment. The following were the matters the learned counsel then referred to, and elaborated upon:

authorities upon an Act are authorities for the interpretation of a Colonial Act in *pari materia*." Again if the same words occur in different parts of a statute or will they must be taken to have been everywhere used in the same sense. *Dwarris on Stat.* 544. It is also said there would be no difficulty in the case, if "sterling money of Great Britain" had been used in the local Act. But in the case of *Dunscomb & Leck, Select Cases of Newfoundland* 539, decided in 1827 in this Court by the three presiding Judges, which was an action of covenant to recover £116 19s. sterling for balance of rent reserved in three leases, viz., in two of them the rent was reserved in "lawful money of Great Britain," and in the third in "sterling money," a special jury returned a special verdict for the amount, subject to the opinion of the Court as to the defendant's liability for sterling money, or for dollars at 5s. each. The judgment of the Court states: "The plaintiffs found their action upon the covenants entered into by the defendant under the leases produced at the trial to pay the rent reserved in lawful money of Great Britain and in sterling money—terms which are synonymous and have the like meaning. In order to discharge himself from the liability to pay the rent in the express terms of the contract, the defendant contends that at the period when these leases were entered into, as well as before and for some time afterwards, dollars were considered as five shillings sterling and so received by the plaintiffs in payment of these rents, and the jury by the terms of their verdict have so found this fact. But this answer does not appear to me to be one that can avail the defendant in the present action. I must construe the defendant's covenants, under which arises his liability to pay the plaintiff's demand, according to the known and established rules of law; and those rules will not allow me to take into my consideration matters foreign to and not making part of the instruments in which the covenants are contained, in order to seek for the meaning of such covenants in direct opposition to their express terms."

Independently of this decision, which is important for more than one reason on the present occasion, as I shall show, we have the fact stated in the special case that in the local Revenue Acts the duties imposed expressly in "sterling money of Great Britain" have been collected in dollars at the rate of 4s. 4d. sterling to the dollar; while we have the no less important fact admitted that from the year 1843 to 1849 the light dues imposed by separate Acts of the Legislature in "sterling"

ment. And that his predecessors, nominated and paid in the same way, were paid at the rate of British sterling.

5. The law as quoted from *Addison on Contracts* applied to a usage of trade, recognized, understood and universally and consistently acted upon *inter mercatores*. It had no application in regarding the construction of the words of an Act of Parliament that had a known legal meaning.

6. It was denied that the words "British shilling" and "shilling" represented different values; there was no such admission in the special case—no evidence of it before the Court. If such were the fact it could be only for conventional convenience. This was no ground for the judgment.

7. As to the practice of the Court in rendering verdicts, there was no admission of it. If any such practice generally prevailed it was a mere matter of convenience, which took its rise from certain circumstances and had not been abandoned. That a verdict given in "sterling" could be discharged by anything but lawful money of Great Britain, was denied.

8. Down to that place, in the judgment of the Court below, where it begins to advert to the local legislative enactments, His Lordship had offered no reason for the construction which he was about to put upon them, except the alleged practice of the Court,

9. Having investigated those statutes, "the local legislative enactments," His Lordship proceeded to say: "the result of that inquiry has been to satisfy my mind that there are three standards of value governing local monetary obligations." In reply to that there was no internal evidence in the Acts themselves. They only used the terms "sterling" and "British sterling," as the case might be, and the very question here is, What is the construction of those terms in a statute? The Acts themselves in no one place throughout the statute book gave the slightest clue to any difference of construction existing between the terms "sterling" and "British sterling." They were used indifferently. The evidence, therefore, of the construction of those terms must be found from extrinsic facts. Counsel submitted, therefore, that His Lordship had assumed the conclusion without the premises. How could it be said then, that "by a reference to these enactments it will be found that where depreciated or local sterling is intended the word "sterling," without the addition of "British," is used, and that "pounds" and "pounds sterling" imported the same standard of value, viz., local sterling"? He submitted that the existence

then, it appears by 2 *Bligh* 79, there was not any lawful money of Ireland, excepting copper appropriated to that country; there was neither gold nor silver of legal currency—there was no such thing as Irish money, it was Irish currency. *Chitty on Bills* 133. It is quite clear from the cases cited, as well as 2 *B. Ald.* 301, that there existed an established well known and generally recognized difference of a thirteenth between Irish and English currency; and if a contract was made in Ireland in sterling with reference to the only recognized standard of value in that country, when there was no difference between its currency and its sterling, and no statute or Royal Charter or Proclamation as in this colony, applying this term to the Imperial standard of lawful money of Great Britain, it would have been very unreasonable and contrary to common sense and justice to have held that such a contract could only be discharged in the more valuable currency of England.

Now as to the Currency Acts, it appears to me, the effect of them was to settle our currency upon a legal and defined basis. Before they were passed, there was no local statute law in force here defining what coins should be a legal tender in currency. The scarcity of dollars, which had been the former circulating medium, obliged the legislature to adopt for the first time the gold coins of England and other countries as the basis of the metallic circulation in the monetary affairs of the colony. From the documents to which reference was made on the argument, and by the Chief Justice in the judgment below, being a letter of the 19th January, 1859, to the Governor from myself in relation to this subject, and referring to his own claim to be paid at the rate of sterling claimed by the appellant, as well as the case prepared by me in 1857 as the then Attorney General, and the opinion of the Crown law officers of England thereon, which I annex for more accurate reference, it is evident that the sovereign fluctuated in value from 23s. 4d. currency to 24s. currency in the trade before the passing of the Acts. In this case, I regard the sovereign and the pound sterling money as convertible terms, and in the investigation I have not been able to ascertain any good grounds for a distinction in point of law between them. Permit me to ask, whence the necessity of the excepting clause in the 10th section of the Permanent Currency Act and in the temporary Act of 1856, if the operation of these Acts was not calculated to introduce a standard that might interfere with some obligations entered into under a different system of currency from that established by them. Par-

Court, which had itself no existence before A. D. 1824, were opposed to it.

13. Again, the judgment proceeded, "that it was urged with great confidence on the part of the plaintiff that notwithstanding the *custom and usage* which had prevailed in Newfoundland," &c This, if intended to infer the admission of the existence of any such custom or usage by the appellant, was incorrect, as the plaintiff denied it, and believed that it was demonstrated beyond a doubt that every essential of usage was wanting. Then some cases applying to Ireland were cited in support of the possibility of the existence of such a usage. There was no case to be found where the mercantile usage was held to be applicable to such claims as the appellant's. That a usage did exist there before the assimilating statute could not be questioned, but it was one the source of which, whether by Irish statute, royal proclamation, or uniform custom, he was not in a position to say, but evidently it had become law and was referred to as having existed for a century. Would it be said that, there where every legal essential was present, the Irish judges would, in the payment of their salaries, be governed by the usage of trade?

Chief Justice—I apprehend it might be so if their salaries were granted under similar circumstances, but I should think they were paid under English statutes.

Mr. Pinsent—If their salaries were reserved under English statutes with such a valid custom existing in Ireland, would not the use of the term "sterling," upon the principle of your lordship's judgment that a usage may affect this case, be construed according to the law of the place of payment and where the contract was performed, and be held as applying to Ireland to mean Irish sterling, if there were such a thing, and thus the salary of the Chief Justice here would be payable in so-called Newfoundland sterling. But he (Mr. Pinsent) contended that even those decisions did not establish a case of "Irish sterling," but of "Irish currency," and merely signified the rate in which sterling coins of the realm were taken in mercantile usage in Ireland; and he contended he was borne out in this by the cases themselves, and also by the Imperial statutes to provide for the civil service of Ireland before the assimilating statute, and which never treated it as Irish sterling and never made use of the term, but spoke of money as so much "Irish currency," leaving uninvaded the meaning placed by law on the term "sterling." *Picodore vs. Marshall*, from *4 B. & C.*, was

cited as showing a recognition of "Irish sterling." It was a case that turned on the construction of an affidavit of debt. The Chief Justice Abbott, than whom there was no higher authority, differed from the three judges who sat with him, who held that in an affidavit made abroad it should be shewn that the sum sworn to was English sterling, because it might be Irish. Were that good law it might now be said that such an affidavit was defective because it might be Newfoundland sterling. The most that could be made of that case was that the reference to Irish sterling was by way of argument in relation to a foreign affidavit. If Baron Wolfe's *obiter dictum* were correct in *Neville vs. Ponsonby*, and that decision of any avail here, the judgment of the Court below must be erroneous, as then lawful money of Great Britain would mean no more than sterling alone.

14. It was said to-day by the learned counsel for the Crown that the duties imposed by the Revenue Acts were paid at sterling rate, meaning 4s. 4d. to the dollar. If so, the government had waived a right which no one contended they might not exercise, viz., to compel payment in "sterling money of Great Britain," which was the term used by those Acts and by the present Revenue Act. The judgment admitted that the use of that term was unequivocal. If from relation to the state of the money market, or rate of exchange, or other cause, the government chose at any time to waive or modify its rights, it did not affect this claim in any way, and that Act applied only to monies granted for duties and other taxes.

The collection of the light dues at different rates was an evidence of the inconsistency and interruption which negative any presumption of usage.

The distinction attempted to be drawn between the Governor's and Chief Justice's salaries and the claim of the plaintiff, was fallacious. The facts clearly shewed the identity of legal rights between them, all at one time reserved in the Reserved Salaries' Act. The Governor's now by the local Act 18 and 19 Victoria, cap. 9, which was less strong in support of the construction made in his favour than the 18 and 19 Vict., cap. 8, under which plaintiff claimed, for this latter recited the Judicature Act and Charter and Reserved Salaries' Act, still preserving the same language; while the former did not *recite*, and its construction was to be found in itself alone. The Imperial Act 2 and 3 Wm. 4, made no reference whatever to specific amounts of salary, and was defunct.

After some further observations the learned counsel, having cited from *Chitty's Prerogatives of the Crown* in regard to the coin and sterling money of the realm, concluded, when the Court said they would take time to consider.

At the conclusion of the case the Chief Justice remarked that in regard to a former part of Mr. Pinsent's argument as to the general relation of the decision in this case, he had not had satisfactorily stated to him any distinction between the right of the present plaintiff and all others whose salaries were reserved under the same statute—Colonial Secretary, Attorney General, Sheriff, &c.,—and that he had not had any candid expression of opinion from either of the learned counsel for the plaintiff on that point.

In reply, both counsel again referred to the nature of the Judge's appointments being Imperial, and as if they received and accepted their appointments in England, and the reservation of their salaries by Imperial Act, without change of language in the amending statutes, and in regard to plaintiff's claim, the admitted facts upon which alone the decision in this case could turn, and the payment of British sterling of the former assistant Judges Lilly and Simms.

The Chief Justice could perceive no grounds upon which the Colonial Secretary and Attorney General receiving patents from the Queen, could be placed upon a different footing under the statute.

The learned counsel said they considered those officers entitled to be paid in British sterling, although their cases were not so strong as plaintiff's, but that the plaintiff was not bound by the mode in which the local government might choose to discharge the salaries of those over whom it had immediate control, and who themselves were disposed on political grounds to yield to popular pressure. The Judges were, as they ought to be, independent of such considerations.

(On a subsequent day the following judgments were delivered):

SIR F. BRADY, C. J.:

This case came before the Court by appeal from a decision I pronounced upon it when presiding alone in the Central Circuit Court, and I beg in the first place to make my kindest acknowledgments to the learned counsel who argued it for the terms in which they referred to myself and to the judgment I pronounced in the Court below; and next to assure them, with

the truest sincerity, of the gratification I felt at the temper, ability, and lawyer-like manner with which they discharged their duties, so unlike the conduct and demeanour of others since I pronounced that judgment.

This cause came on for hearing in the Court below upon the 13th of February last, and I then proposed to transfer it to the Supreme Court, under the power given by the 15th section of the Judicature Act, 5 Geo. 4, c. 67, but Mr. Carter, for the plaintiff, and the Attorney General, for the Crown, having united in opposing that transfer, insisting that they only desired my opinion and judgment, I felt that I was bound to hear the cause, and upon the hearing of it I pronounced judgment of non-suit against the plaintiff. The appeal is brought to reverse that judgment, and it has been suggested in argument that it is unfortunate for the plaintiff that the Judge who decided against his claim in the Court below, should be one of the Judges to hear the appeal; but I apprehend, if it were the plaintiff's good fortune to have had my decision in his favour, and the appeal was brought on behalf of the Crown, he would consider any observation upon that ground extremely frivolous and worthy of contempt. In every appeal from the decisions of the Lord Chancellor of England, he is himself the presiding Judge, aided and assisted by the law Lords in Parliament; but if that circumstance could be suggested in other cases as a grievance to, or a disadvantage upon, the appellant, it does not hold in this case. I have, in the discharge of my duty as a Judge, to whose decision the parties in the cause voluntarily appealed, given my decision against the claim of the plaintiff; and, while I have thus expressed an opinion in pronouncing a judgment adverse to the claim of the plaintiff, Mr Justice Little, who is the only other Judge at present in this Court, and who sits to give a decision in this cause, has, in a former proceeding in this cause, volunteered this statement: "I stated that I have a similar claim upon the government to that made by the appellant in this case; that I united with him on the early stage of the discussion upon the subject in issue in this case, in trying to obtain payment of our several and respective salaries from the government at a certain sterling rate; that a special case was prepared on his demand, and I instructed counsel to co-operate with his counsel on the subject. That case was repudiated by the then Executive Council, and Judge Robinson then proceeded by a petition of right to enforce his claim. I took no proceedings at law, but freely ex-

changed opinion with Judge Robinson, not only on the legal merits of the question, but also on his proceedings at law. I may therefore be considered, if not as an interested party in the settlement of the general question, at least as having formed and expressed in private with him, and in my letters to the Government on the general question, an opinion adverse to the decision given by the Chief Justice in the Central Circuit Court." So much for that circumstance. I pronounced my judgment upon the 15th of March last, and this appeal was brought on for hearing on the 18th of July. The case was then argued with great ability, but that argument, instead of being directed to establish, as the plaintiff was bound to do, his right to recover his demand, was altogether directed to an impeachment of the validity of the grounds upon which I based my judgment in the Court below. The plaintiff's right is rested solely upon what is said to be the legal meaning of the word "sterling" in the Act of the Legislature under which he claims his salary, importing, as is contended, sterling money of Great Britain, and that course is adopted in the argument of a special case which admits that payments have been made, not in British, but in what is called local, or Newfoundland sterling, or in other words, at the rate of 4s. 4d. sterling to the dollar, under various Acts of the Local Legislature appropriating the revenue of the colony to the public service, for a period of thirty years, under the word "sterling," without evidence of complaint, remonstrance, cavil, or question from a single servant of the Crown, until the plaintiff, as Master-in-Chancery, addressed the letter in 1855 to the Receiver General, which is annexed to this case, making the same claim he now prefers to this Court, and which was then denied to him, and which claim was not further prosecuted, although I must express my opinion that an opportunity more convenient and becoming for asserting his rights was then open to him, than after he assumed the position of a Judge of the Court which, when raised before it, was to decide that question. In the case submitted to the judges on this appeal, a number of reasons against my judgment have been stated, and so far as these are worthless and unfounded in fact I need not notice them, for they are so much waste paper, and can have no more influence upon the decision of this case than the letter of Mr. Justice Little, to the reading of which at this hearing I assented as a matter of favor and not of right; but I will say that it would be due to myself and to the office I hold to characterize some of them as, in my judgment, they deserve

to be characterized, were it not that the highly proper and commendable manner in which this case was argued by the learned counsel for the plaintiff, avoiding all allusion to the matters to which I refer, relieves me from doing so.

I will now refer to the judgment I pronounced in the Court below, and notice as I proceed how far the positions upon which I based that judgment have been weakened or affected by the arguments or observations of the learned counsel for the plaintiff. I then stated :

"This cause comes before the Court upon a special case agreed upon by Mr. Carter, on behalf of the plaintiff, and by the Attorney General, on behalf of the Crown, and it is one of grave and vast importance, not so much to the plaintiff, but to the public, because the monetary transactions and obligations of the government are to a large extent involved in the decision of it, and private rights and liabilities may be seriously affected, as it is impossible to know to what extent private contracts and other documents exist, the construction of which may be governed by the final judgment in this case. In determining the matter in litigation, I am restricted to the statements in this case and to such matters as I am bound to take judicial notice of. The question raised in this case depends upon the interpretation to be given to the word "sterling" in the Act of the local legislature, 18 and 19 Vic., chap. 8, sec. 1, passed in 1855. The plaintiff contends that that word is to be construed as importing British sterling, or sterling money of Great Britain, or lawful money of Great Britain, while the law officers, on behalf of the Crown, insist that when the word "sterling" is used alone and without such additions as "British sterling," or "sterling money of Great Britain," or words of the like import, it denotes an inferior and depreciated value in Newfoundland, or in other words, what has been called local or Newfoundland sterling. It cannot, I apprehend, be questioned that there are three standards of value governing local pecuniary contracts and monetary obligations in this country ; first—an obligation in currency, which is discharged by payment in dollars at five shillings currency each, or its equivalent, under the Currency Act ; secondly—an obligation to pay, say £100 British sterling, or sterling money of Great Britain, which is discharged by payment in dollars at 4s. 2d. each, or £120 currency ; and thirdly—an obligation to pay £100 "sterling," which has hitherto, for some thirty years, been discharged by payment in dollars at 4s. 4d. each, or £115 7s. 8d. currency." This position was not

denied or questioned, save by an objection to the term "standards." I know no more appropriate word to explain different rates of value, and my subsequent observations will shew that it could not be denied. "With respect to obligations in the language mentioned in the first and second classes, no real practical difficulty has ever arisen as to their discharge, for a debt in currency was discharged by payment in currency; and as to those in British sterling, for example, the reserved salaries, they were discharged in British coin, or in its equivalent, dollars at 4s. 2d. each. If the salary in the present case had been granted in the language which clearly distinguishes these two classes, this case would not be heard of; but the plaintiff contends that the word "sterling" alone imports the same standard of value as the words "British sterling," or "sterling money of Great Britain"; while on the part of the Crown it is contended that when the word is used alone it denotes, by custom and usage in this country, a depreciated amount or value which is or may be called local or Newfoundland sterling, and that the monetary obligations created thereby is discharged by payment at the rate of £115 7s. 8d. currency for every such £100 sterling. It cannot be denied that custom and usage do in very many cases alter the primary and ordinary sense and meaning of words, and that the same words represent or describe distinct and different things, numbers and values in different localities, and the instances are of frequent occurrence in which they are recognized and established by law. The law is thus stated in a work of high authority, *Addison on Contracts*:

"Custom and usage have a powerful influence upon the interpretation of contracts, and determine to a great extent the meaning of the words used therein. If by the known usage of trade, or by custom, a word has acquired in respect of the subject matter of the contract, a peculiar sense and meaning, different from the ordinary popular sense and meaning, parol evidence is admissible to show that the parties used the word in its customary trade acceptance, and not in the ordinary popular sense. Thus, the word *thousand* in certain trades comprehends a larger number of units than it does in its ordinary acceptance. In the herring trade, for example, *six* score herrings go to the hundred and *sixty* to the thousand; and parol evidence is admissible, consequently, to show that the word *thousand*, when applied to herrings in the contracts of herring dealers, means twelve hundred. In a lease of a rabbit warren,

the payment of a Spanish dollar, and that as the Spanish dollar was current at 5s. money of account, therefore that 17s. 4d. of British silver is to be taken as equal to one pound of money of account. Now, three and a-half crowns, at their nominal value, would be 17s. 6d. of British silver, and are equal to twenty-one shillings of money of account, or in other words, of our present legal currency. If then the appellant's salary of £650 sterling be reduced to currency at the rate of 4s. 4d. stg. to the dollar, or £115 7s. 8d. currency for each £100 sterling, it will make £750 currency. To pay this sum at the rate of 17s. 4d. in British silver for each pound currency would give the appellant just what he seeks, £780 currency. This result arises from the fact that 4s. 4d. in sterling money is four per cent. more than the value of a dollar in sterling, and that the former was underrated that much in the proclamation, by a regard to the sterling value of the dollar. But supposing, under the alleged usage, he were paid in dollars at 4s. 4d. sterling each, the case would then stand thus: In consequence of the introduction of gold coins by the operation of the currency Acts of 1854 and 1856, dollars have gone out of general circulation in the Colony, and I presume could not be had at any of the banks under a premium of four per cent., so that the practical result in this view is the same as in that I have just illustrated. It cannot, I conclude, be correctly contended that the currency value of the sovereign, which was so fluctuating prior to 1854, was the foundation of any uniform custom or usage to pay £100 sterling in £115 7s. 8d. currency, for if we ask what currency is meant by this proposition with reference to the value of the sovereign, the answer would be the current value of it at the day—perhaps 23s. 4d., or 23s. 5d., or 23s. 9d., not a certain fixed value, such as 5s. currency affixed to the dollar. I am not aware of any authority to support such a proposition.

It appears to me, therefore, that the payment of 650 sovereigns per annum was not a legal satisfaction of the salary of £650 sterling money; but I shall be most happy to find that a higher tribunal may be afforded an opportunity of considering the case; and if I should be in error, of overruling my decision, for it is possible that my opinion, however honestly entertained, may be open to exception.

The Chief Justice having read his judgment.

Judge Little observed that he felt himself called upon to correct an error, doubtless unintentionally made by his learned brother, to the effect that he and the appellant were co-suitors,

should be issued upon the judgment payment to the amount in the depreciated or local sterling satisfies the demand, although it is marked for so much pounds, shillings and pence sterling." This position was left unquestioned in the argument, but Mr. Pinsent endeavoured to weaken its influence upon the decision of the case; nor was the position that "under the course of the proceedings of our courts, a judgment for £100 *sterling* is satisfied by payment of £96 3s. 1d. sterling money of Great Britain." In the reasons it is simply denied, but I must reiterate it.

"This practice of the courts of justice, which has prevailed for nearly thirty years, does appear to me to demonstrate most strongly the fact that in Newfoundland the word "*sterling*" does not *ex vi termini* denote the same amount as the words "*sterling money of Great Britain*," or "*British sterling*," or words of similar import, but that, as interpreted, understood, recognized and acted upon in the courts of law, it denotes a lower amount or lower standard of value, and proves that, at least to this extent, this word has acquired in this country a sense and meaning other and different from its import and meaning in England, and such being the case for so long a time in the proceedings in the courts of law in this country, it would seem to favor the conclusion that it should be regarded as the legal import and meaning in this country of the word "*sterling*" when used alone."

"I shall now advert to your local legislative enactments, and show how far they have tended to influence the judgment at which I have arrived in this case. As I have never before had occasion to investigate this or any other matter involving questions respecting our currencies, I have been compelled to go through a laborious examination of the whole legislation of the colony since the establishment of a local legislature in 1833; and the result of that enquiry has been to satisfy my mind that the three standards of value governing, as I have already said, local monetary obligations, have been always borne in mind in framing enactments in relation to the collection, appropriation and disposition of the public monies of the colony. On reference to these enactments in connection with the admissions in the special case, it will be found that when "*British sterling*" is intended, plain and unmistakeable language is used; when "*currency*" is intended, that that word is used; and lastly, when the depreciated or local sterling is intended, the words "*sterling*" or "*sterling money*," or the simple designation "*pounds*," without the addition of "*British ster-*

ling" or "sterling money of Great Britain" or "currency," are used to denote the value intended; and I think it will appear plain and manifest that these words "pounds" and "pounds sterling" are used indiscriminately throughout this legislation of some thirty years to denote the depreciated or local sterling. The first enactment of our legislature, in the year 1833, was to provide for the performance of quarantine; and by the 5th section it imposed a penalty of £100 "sterling money of Great Britain," and in several subsequent sections the words *sterling money as aforesaid* are used. Again, in the first enactment for raising a revenue, the 4th Will. 4, c. 1, s. 3, it is enacted "That all sums of money granted or imposed by this Act, either as duties, penalties or forfeitures, shall be deemed, and are hereby declared to be, sterling money of Great Britain." And again, in providing for the retirement of the assistant Judges Des-Barres and Simms, who had always received their salaries in British sterling, the language of the legislature is equally clear and plain in the 21 Vic., c. 22, s. 1, which enacts "That they shall receive, for the term of their respective natural lives, as a retiring allowance, the sum of £275, in sterling money of Great Britain, out of the public funds of the colony." It will also be found that when the legislature intends to designate currency like precision of language is observed, as will be found in the several enactments throughout the same period fixing the rate of pilotage by expressly fixing them at so much "*currency*"; and also in the 13th Vic., s. 1, and the 14th Vic., s. 1, providing the form of the treasury notes therein mentioned, these words are used, "The bearer of this note is entitled to receive at the treasury the sum of — *pounds currency*." With these exceptions it will be found that in every other enactment respecting the public monies of the colony, and in relation to its appropriation to every branch of the public service, the words "pounds" and "pounds sterling" are used indiscriminately, and import the same standard of value, viz., local sterling.

"The case before me erroneously states that the general acts of appropriation have always granted the money thereby appropriated as pounds generally, without distinguishing whether such pounds were currency or sterling, but the fact on examination will be found otherwise; and I am bound to notice and act upon the local enactment, and not upon mistakes in this case. Thns, in grants for roads, to give a few instances. the words "pounds sterling" are used in 6 Will. 4, c. 15; 1 Vic.,

c. 21; 2 Vic., c. 2;—"pounds" only in 6 Vic., c. 4, and 7 Vic., c. 9. In grants for the civil contingencies of the legislature, which have a particular bearing on the plaintiff's rights in this case, the 4 Will. 4, c. 25; 5 Will. 4, c. 17; 2 Vic., c. 11, and 6 Vic., c. 25, have the words "pounds sterling," while the 5 Vic., c. 10; 7 Vic., c. 16; 8 Vic., c. 16, have the words "pounds" merely; and the same will be found in the enactments for raising loans, appropriations for the civil service, for education, &c., &c. Moreover, the word "sterling" will be found in reference to monies mentioned in the enactments for these several purposes, to be used one year, omitted the next, inserted the following, and so on; and also, it will be found used in enactments for one or more of these purposes, and omitted in enactments in the same session for the other purposes. A similar examination of the various enactments authorising the raising of loans for public purposes will shew that the amount to be raised is stated indifferently in them as "pounds" and "pounds sterling"; and also, these enactments in which the word "pounds" alone is stated, show that that word implies, by the form of their debentures given in the several schedules to these acts which contain the words "pounds sterling," that the amount or value was intended as if the words "pounds sterling" were used in the granting part of such enactments. Thus, in the 6 Will. 4, c. 14; 6 Vic., c. 23; 7 Vic., c. 3, c. 7; 9 and 10 Vic., c. 1; 10 Vic., c. 2; 12 Vic., c. 19; 14 Vic., c. 8, and 17 Vic., c. 4, the amount authorised is specified in "pounds" merely, while the debentures on which that amount was to be raised specify "pounds sterling"; demonstrating, as it appears to me, that the addition or omission of the word "sterling" to the word "pounds" did not, in the mind of the legislature, alter or effect the standard of value it intended to denote. And in this respect the enactments would be analogous to those in the Imperial Parliament, with this difference, that the word "sterling" in the latter would denote British sterling, while in our acts it would denote Newfoundland or local sterling. Thus, if an Act of the Imperial Parliament gave 100 or 1000 "pounds" a year to an individual, or for any object, these words would give precisely the same amount as if the Act said 100 or 1000 pounds "sterling money of Great Britain"; and from the review I have given of the enactments in this country, I think a precisely similar rule is deducible, and that where the words "pounds" or "pounds sterling" were used the same amount or the same standard of

ling," or "sterling money of Great Britain" or "currency," are used to denote the value intended; and I think it will appear plain and manifest that these words "pounds" and "pounds sterling" are used indiscriminately throughout this legislation of some thirty years to denote the depreciated or local sterling. The first enactment of our legislature, in the year 1833, was to provide for the performance of quarantine; and by the 5th section it imposed a penalty of £100 "sterling money of Great Britain," and in several subsequent sections the words *sterling money as aforesaid* are used. Again, in the first enactment for raising a revenue, the 4th Will. 4, c. 1, s. 3, it is enacted "That all sums of money granted or imposed by this Act, either as duties, penalties or forfeitures, shall be deemed, and are hereby declared to be, sterling money of Great Britain." And again, in providing for the retirement of the assistant Judges Des-Barres and Simms, who had always received their salaries in British sterling, the language of the legislature is equally clear and plain in the 21 Vic., c. 22, s. 1, which enacts "That they shall receive, for the term of their respective natural lives, as a retiring allowance, the sum of £275, in sterling money of Great Britain, out of the public funds of the colony." It will also be found that when the legislature intends to designate currency like precision of language is observed, as will be found in the several enactments throughout the same period fixing the rate of pilotage by expressly fixing them at so much "*currency*"; and also in the 13th Vic., s. 1, and the 14th Vic., s. 1, providing the form of the treasury notes therein mentioned, these words are used, "The bearer of this note is entitled to receive at the treasury the sum of — *pounds currency*." With these exceptions it will be found that in every other enactment respecting the public monies of the colony, and in relation to its appropriation to every branch of the public service, the words "pounds" and "pounds sterling" are used indiscriminately, and import the same standard of value, viz., local sterling.

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value, viz, depreciated sterling, was intended; and where either of the two standards of value were intended appropriate expressions were used to denote them. This view of these enactments, in my judgment, clearly proves that these words in our local laws are used indiscriminately, and are, in fact, synonymous. The admission then in the case that all the general Acts of appropriation, such as supply, roads and contingency Acts, have always been discharged at the rate of £115 7s. 8d. to every 100 pound so granted, equal to dollars at 4s. 4d. for every such "pound"; and as I have shown that such grants were indifferently in pounds sterling or in pounds merely, and that such words in the enactment of the legislature are, in truth, synonymous, it establishes, in my opinion, during that long period, a uniform custom and usage to discharge all monetary obligations as are in "sterling" at the rate of dollars at 4s. 4d. sterling each, or £115 7s. 8d. currency for every £100 "sterling." The whole of this view was left unshaken, with the exception of two or three enactments to which I will presently advert, and under which it was contended a different practice prevailed. "I will now consider this subject in reference to the salary of Master-in-Chancery, upon which the plaintiff first raised this question in the year 1855, as appears by his correspondence with the Receiver General of that period, appended to this case. I have already shown that in many instances grants for the contingent expenses of the legislature were made in "pounds sterling." The Act under which the plaintiff claimed his salary as Master-in-Chancery (the 18-19 Vic. c. 19) granted four thousand one hundred and seventy-nine pounds sixteen shillings and five pence, without the word "sterling," to be applied, &c., as follows:—Clerk in the Council, £150; Master-in-Chancery, £125; and so on to the several officers and other persons named therein, to the number of fifty or sixty, for their respective services until the above mentioned sum of £4,179 16s. 5d. was exhausted, and then, as the case admits, the claims of those persons were discharged by payments at the rate of dollars at 4s. 4d. each, plainly shewing that the paymaster knew that he was authorised to pay £4,179 16s. 5d. at that rate and no more, and that the recipients knew they were to receive the same amount and no more amongst them in discharge of their several claims. The plaintiff's objection to the rate at which his salary under this Act was paid, had not the colour of the word "sterling" to sustain it, for that word does not appear in the Act. The same course has always

prevailed under Acts for those expenses containing the grant in "pounds sterling," in both cases the appropriations have always been discharged at the same rate, as the case admits, the plaintiff raising the objection. certainly in 1855, which, however, produced no alteration, but fixed him with express notice of the value in which such appropriations were discharged; the local sterling was received in payment of the salary, and no further steps appear to have been then adopted by the plaintiff, and I own I am unable, under these circumstances, to discover any arguable ground upon which to rest a claim to have the salary of Master-in-Chancery under that Act, in which the word "sterling" is not to be found, paid in sterling money of Great Britain." This position was not questioned beyond an objection to my saying that the plaintiff's claim, as Master-in-Chancery, was not arguable. "I will now refer to the Act upon which the present question arises—the 18-19 Vic. cap. 8, passed 1855. The first section of that Act grants to Her Majesty "such a sum of money as will suffice to pay unto the several and respective persons appointed to the several offices in the government of this island, as are hereafter mentioned, the following salaries and allowances in sterling money, that is to say, unto," &c., &c. The right given by this Act to the plaintiff is neither more or less than that which is given to the several other officers named with him, and I am unable to discover on what grounds I am to give a different interpretation to the words "sterling money" in this Act from what I have already given to the words "pounds sterling" in the several enactments for the various branches of the public service to which I have referred; or how I could hold that these words import any other standard or value than local sterling." The position that 'the right given by this Act to the plaintiff is neither more or less than that which is given to the several other officers named with him,' was strongly contested by Messrs. Carter and Pinsent, feeling, no doubt, if it were upheld, how severely it would damage the case they were endeavouring to sustain. That Act, after reciting that "Whereas it expedient and necessary to reduce the salaries of the principal officers of the *Civil* and *Judicial* establishments of this island, and to make adequate provision, according to the means and ability of the people of this island, for the said officers," it enacts by the first section, "that there be granted to Her Majesty, &c., in every year such sum of money as will suffice to pay unto the several and respective persons appointed or to be

appointed to the several officers in the Government of this island as are hereafter mentioned, the following yearly salaries and allowances in sterling money, that is to say,—unto any person who shall hereafter be appointed Chief Justice, &c., the sum of £850. To any person who shall hereafter be appointed Assistant Judge, £650; Colonial Secretary, &c., £500; Receiver General, £500; Financial Secretary, £300; Sheriff of Central District, £300; Sheriff of Northern District, £300; Sheriff of Southern District, £200." The 4th section then enacts "that when and as soon as either of the offices of Chief Judge or Assistant Judges of the said Court shall become vacant by the death, resignation, removal, or otherwise, *of the present incumbents* of said offices, or any of them, their successors in the said respective offices shall not receive *any larger or greater amount of salary* or compensation for discharging the duties of the said respective offices of Chief Judge and Assistant Judge of the said Court *than the amount of salary described*, limited, and provided for the said respective offices in the said first section of this Act, *notwithstanding anything to the contrary contained in the said recited Acts and the said Letters Patent.*" I have carefully considered the provisions of this Act, and the arguments and observations of the learned counsel for the plaintiff upon them, and I do feel, without the shadow of a doubt upon my mind, that it is impossible to establish any sound distinction between the Judges and the other officials named in it, or to give to the former any greater rights than every individual named in it possesses; and although this Act was passed in 1855, when Mr. Justice Little was Premier and Attorney General, and it has been since in operation as to him and the other officials named in it, with the exception of the Assistant Judges, it is not pretended that a question was ever raised, or a doubt ever suggested, as to the amount in which these salaries were to be liquidated until, as Judge Little avows, he and the plaintiff became co-suitors, as the Assistant Judges of the colony, and preferred this claim to be paid at the rate of 4s. 2d. sterling to the dollar. If I am correct in that view, and the Judges have no rights beyond those which every official named in the Act has, and these rights depend upon the word "sterling money," then not only the officials named in that Act, but every recipient of the public monies of the colony who derived his interest in them or his claims upon them, under Acts in the same words or words co-extensive in their meaning, *and this includes all*, would be equally entitled to be paid at the

rate of British sterling, but against the validity, the legality, the honesty of that view. there is the overwhelming presumption derived from the admission in the case, that for thirty years such claimants have received without objection, payments at the rate of dollars at 4s. 4d. sterling. To avoid this position, both the counsel for the plaintiff contended that the plaintiff's claim did not rest upon this Act alone, but that he relied in sustainment of it also upon the Judicature and Reserved Salaries Acts, and upon the Charter, or Letters Patent, which gave the Judges Salaries in British sterling, and which they insisted should be read in conjunction with this Act, and that thereby the right of the Judges and of the plaintiff, as one of them, to British sterling would be established. Observe the dilemma in which this argument places the plaintiff; he yields to the Crown the whole case for which it contends, viz.,—that the words "sterling money" in this Act, will not, without something more brought in aid of it, *dehors* the Act, give him British sterling; but when I look to what is brought in aid to give this peculiar privilege to the Judges over the other officials named in the Act I find that the Act declares these enactments and Charter shall do no such thing, but that the Judges shall receive no greater compensation than the salaries named in the first section of the Act, "notwithstanding anything to the contrary contained in the said recited Acts and the said Letters Patent"; thus clearly proving that the plaintiff has, out of his own mouth, exposed the weakness and fallacy of the grounds upon which he based his claim. I next stated that I would again refer to one of the Acts for the contingent expenses of the legislature, which contains the grant in *sterling*, and I apprehend it will be clear that there is no distinction between it and the Act under which the present claim is preferred. Take the 5 Will. 4, c. 14, in 1835, or the 6 Vic., c. 25, (1843), and the grants are in these terms, "That there be granted to Her Majesty, &c., the sum of three thousand two hundred and fifty-nine pounds, six shillings and one penny, *sterling*, to be applied, &c., as follows: "to the speaker, two hundred pounds," and to the other officers, enumerating them, until the amount is exhausted."

It is, I conceive, impossible to discover any valid distinction between the language used in these enactments and that under which the plaintiff claims, and I am, therefore, bound to give to them the same interpretation and hold that the standard of value under the Act I have to decide upon in this case, is local sterling, unless there be some other enactments to con-

Judge Little—We can receive the appeal now, and hear it on Saturday.

Chief Justice—I am not in a condition to give judgment on the present application. I shall be able to settle a judgment by Saturday.

It was then agreed that the case should stand over until Saturday.

Mr Carter, Q. C., for plaintiff.

Hon. Attorney General for the Crown.

IN RE INSOLVENT ESTATE OF JOHN KAVANAGH.

1862, *January*, HON. MR. JUSTICE ROBINSON.

Insolvency—Liability of Trustee in insolvency for wages of servant for period in which servant has been kept out of his wages.

There is no liability on a Trustee in insolvency for the wages of a servant for any time after his agreement has expired—even though he has been improperly kept out of his wages.

MR. JOSEPH LITTLE, representing Mr. Hogsett, who took exceptions to the master's report on certain matters referred to him with regard to Nicholas Berrigan's claims on this insolvent estate. Counsel moved that report be referred back to the master for amendment. The master disallowed Berrigan's claims to wages after the time of his service had expired. The report in this respect was not in keeping with strict justice and law. The third section of the 21 Vict., cap. 9, supported counsel's view. The master should also have allowed Berrigan the costs of the petition. It was the usual practice. Mr. Wm. V. Whiteway *contra*. He did not understand the nature of his learned friend's motion. The usual course of proceeding was that a rule should be taken out to confirm the master's report, or file exceptions to it within four days. Counsel waived this technical objection, and addressed himself to the principal objection taken to the report. The third section of the Act quoted did not support the view contended for on the other side. It enforced a penalty, a forfeiture in particular instances, but not in the case of an insolvency. The master was quite justified in law in disallowing the further sum of wages. Coun-

the obligation is in sterling money of Great Britain. Suppose a case where a tenant holds his house under such a contract, say at a rent of £100 a year, British sterling; the tenant knows he must pay, and the landlord knows he is entitled to receive, 100 sovereigns, or one hundred pounds sterling money of Great Britain, or its equivalent in currency, at the rate of 24s. to the pound, and how the enactment, without the proviso, could affect such a contract I am unable to discover.—These words “payable in sterling money,” contemplate and thereby recognise contracts payable in local sterling, in order to prevent parties who might otherwise, on the ground of the sovereign being made equal to twenty-four shillings, attempt to exact payments under such contracts at that rate. However this may be, it is not now of much importance, as both the Acts were temporary Acts and have expired. In their stead the 19 Vic., c. 11, was passed, and, amongst other provisions by the second section, it enacts that “the British sovereign shall be equal to and a legal tender for one pound four shillings of the present current money of this colony”; and the 10th section contains this enactment, “And whereas, by this Act, one pound of *British sterling money* is hereafter to be represented by one pound and four shillings currency, according to the respective rates or value of the several coins hereinbefore mentioned, and at which they are, by this Act, fixed and determined, and to be hereafter a legal tender; and whereas there exist leases, bonds, debentures, and other monetary obligations voluntarily entered into by the parties thereto previous to the passing of this Act, reserving rents and other monies, payable in, and setting forth the payments therein expressed to be made, shall be payable in sterling or sterling money of Great Britain; and it therefore becomes necessary to declare that the provisions of this Act are not intended in any way or manner to affect such leases, bonds, debentures, or other monetary obligations. Be it, therefore, enacted and declared that nothing in this Act contained shall extend, or be construed to extend, to affect any lease, bond, debenture, or other monetary obligation, made and entered into before the passing of this Act, wherein the rent received or payable thereunder is expressed to be payable in sterling or sterling money of Great Britain; but the same shall be and remain subject to the same legal interpretation and construction in every respect as the same would by law have been subject to provided this

Act had never been made, anything herein contained to the contrary notwithstanding."

The operation and effect of this clause is, in my judgment, to render this enactment, which was relied on as favorable to the claim of the plaintiff, very adverse to it. It its recital it states that whereas "one pound of *British* sterling money," not as Mr. Justice Little wrote, "a pound sterling shall be equal to twenty-four shillings currency, advisedly and carefully using the words "British sterling"; and then it enacts that all rents, &c., and other monetary obligations entered into previous to the passing of the Act, where such rent or money payable under such obligations is expressed to be payable in sterling or sterling money of Great Britain, shall not be affected by that Act, but the same shall be subject to the same legal interpretation and construction in every respect as the same would by law have been subject to, provided that Act had never been passed—thus obviously, throughout the section, in my judgment, marking the distinction which the legislature had always made between "sterling" and "sterling money of Great Britain," and leaving monetary obligations in "sterling money" or local sterling, such as the plaintiff's, precisely as they stood before the passing of that Act. It was endeavoured to impeach this interpretation and construction, but in my opinion unsuccessfully. The same distinction is manifest in the Acts granting retiring allowances to the two late assistant Judges, DesBarres and Simms, and to Mr. Ayre. The language used in the 21 Vic, cap. 22, sec 1, for the allowance to the assistant Judges, is £275 "in sterling money of Great Britain"; for the allowance to Mr. Ayre, £175 "sterling" in the very next Act. Could stronger proof be given of the distinction which marks our legislation and its meaning in the use of these words, "sterling money of Great Britain" and £—"sterling," than is derived from these two enactments? two Acts passed co-temporaneously, and when I ask myself why this distinction should exist, I have only to look to previous legislation respecting these two classes of officials and I find it explained that the salaries of the Judges were paid in British sterling, or in dollars at 4s. 2d., while that of Mr. Ayre was paid at the rate of dollars at 4s. 4d., or, in other words, in local sterling; and the legislature, therefore, in granting the retiring allowances, maintained the same distinction, and gave to the Judges their allowances in British sterling, and to Mr.

Ayre his allowance in local sterling. The Solicitor General relied upon two cases decided in our courts, in which rent reserved in "sterling" was declared by the verdicts of juries to be satisfied by payment at the rate of dollars. There were *Brine vs. Tobin*; *Winter vs. Row*; and, with respect to the first of these cases, the judicial records are not forthcoming, and I shall not, therefore, observe further upon it; and, with respect to the second, while it confirms the opinion which in this case I have formed quite independent of it, as all the proceedings in that case came judicially before myself. I feel that I ought upon this occasion to state them, in order that it may be seen why the Court declined to make that case to any extent a ground for its decision, although relied upon on behalf of the Crown. The action in that case was an action of debt for rent brought in 1855 upon a lease bearing date the 3rd October, 1846, in which the rent was thus reserved "at the yearly rent of £255 *sterling*," and in that action the plaintiff claimed to recover, as arrears of rent, the difference between payments which he had received for a number of years at the rate of dollars at 4s 4d. and what he insisted he was entitled to receive, payment at the rate of dollars at 4s. 2d. each. This was the substantial question in the case, and in directing the jury in that case I told them that they were bound to hold the defendant liable to pay the rent in British sterling, unless they were satisfied upon the evidence that universal usage had in this country affixed a different meaning to the term "pounds sterling" from its ordinary import and meaning. The jury, which was a special jury, found a verdict, which they reduced to writing in these words: "The jury found the rent named in this lease to be payable at the rate of four shillings and four pence sterling for the dollar." Upon the application of the plaintiff's counsel, Mr. Robinson, (the plaintiff in this case), the jury were polled and each of them declared he found for the usage. A motion was afterwards made for a new trial, on which I granted a rule returnable in the Supreme Court upon two grounds,—1st, as to the evidence of usage, and 2nd, as to the admission of certain parole evidence, and upon argument, we thought the case of such importance, that we ought to allow a second trial, and we set the verdict aside. The case was never again brought before the court, and therefore I do not rely on it as a binding decision.

It has been, however, urged with great confidence on the part of the plaintiff, that notwithstanding the custom and usage which

1862, January. HON. SIR F. BRADY, C J.

Criminal law—Practice—Prisoner held under warrant of coroner for wilful murder—Bills for wilful murder and manslaughter ignored by grand jury—Application for discharge for want of prosecution—General gaol delivery—Bail.

The prisoner stood committed under a warrant of the coroner for wilful murder. Bills of indictment for wilful murder and manslaughter had been sent to the grand jury, but ignored by that body. The term of court having passed without the prisoner being tried, an application was made on his behalf for his discharge under the general proclamation, or for bail.

Held—The ignoring by the grand jury of the two bills sent to them, weaken the influence which the finding of the coroner would have had on the court, and the court would not therefore be justified in refusing the application of the prisoner for bail, particularly when one term has passed without putting the prisoner on his trial

IN this case the Attorney General showed cause on Friday last to a rule obtained by Mr. Pinsent, on behalf of Charles Tynan, for his discharge from custody either under the general proclamation on the last day of the sitting of the court for the discharge of all persons in custody, who were not tried, without bail, or if the court did not accede to that portion of the application, then that he should be admitted to bail. I do not feel that it is necessary to refer to the circumstances of this case more at large at present than to state that the prisoner stands committed under a warrant of the coroner, bearing date the 10th day of April last, for the wilful murder of William Manning, founded upon an inquisition taken by the coroner on view of the body of the said William Manning; and also that a bill of indictment for murder was in the present term sent up to the grand jury and ignored, and subsequently a bill for manslaughter, which was also ignored.

We are all agreed in the rules we are about to make in this case; but as questions affecting the liberty of the subject, the prerogatives of the crown, and the powers of the judges, are involved in its consideration, I will express very briefly the grounds upon which I rest my decision. Mr. Pinsent contended that the prisoner, not having been tried at the present term of the court, is entitled to his discharge without bail under the general proclamation for the discharge of all prisoners not prosecuted; while the Attorney General insists that where there is upon the records of the court a coroner's inquisition, with a finding of wilful murder against the prisoner, and the depositions upon which that finding is based, that the court will not

set a party free under that proclamation, and that his statement that he, in the exercise of his discretion, did not bring the prisoner to trial, was sufficient cause against the prisoner's discharge. To that proposition I could not assent without authority which would coerce me, and none has been cited to sustain it. Such a proposition if acquiesced in would establish this position, that judges who are empowered and commissioned, in the exercise of their discretion, to discharge the prisons of all parties imprisoned therein for offences which they have jurisdiction to try, and who are not tried during the sitting of their court, should suffer the exercise of that discretion which is vested in them by the common law, confirmed by the authority of Parliament, in favor of the liberty of the subject to be controlled or limited by a mere declaration on the part of the crown, or of those who represent the crown, that they forebore to proceed to the trial of a party, acting merely in the exercise of their discretion. That position rests upon nothing that I can discover but the assumption of a prerogative in the crown against the authority of the law of the land; but the court will give great consideration to the opposition and objections of the first law officer of the crown, and to the grounds upon which he objects to the discharge of a prisoner whom he has not prosecuted during the term of the court, although an inquisition or indictment be pending against him.

The ignoring by the grand jury of the two bills of indictment sent to them are relied upon by the Attorney General in this case as constituting good and valid grounds for the exercise of his discretion in not arraigning the prisoner at the present sitting of the court, upon a charge of wilful murder under the coroner's inquisition; and I have no hesitation in expressing my concurrence in that view, and therefore holding that, in the exercise of a sound discretion, we ought not to discharge the prisoner from custody without bail while the coroner's inquisition remains on the records of this court, upon which he may hereafter be arraigned and tried.

Mr. Pinsent, however, also contended that the inquisition in this case was wholly defective and void, and that it therefore afforded no ground for the court to act upon; and he relied upon several objections to its validity which would demand most grave consideration if the prisoner were arraigned upon it, and they were taken at his trial under it. But we are all of opinion that we ought not to decide upon them on a summary application like *the present*.

The next question is whether the court ought to admit the prisoner to bail: and we are of opinion that, under the circumstances of this case, we ought to comply with that part of the present application. For myself I will say that, if there was nothing before me but the inquisition and the depositions before the coroner, I would have great difficulty in yielding to the application. The duty of the court is thus clearly laid down in the last edition of *Archibald's Criminal Law*, 110: "In the exercise of its discretion, the court is guided not by the finding of the jury, nor by the commitment, but by the facts and circumstances of the case as disclosed by the depositions; and where the offence appears to amount to no more than manslaughter, the court will in general accede to the application, even though the coroner's jury have found a verdict for murder; it will look into the depositions and exercise its discretion, whether the offence amounts to murder or manslaughter, and refuse or accept bail accordingly."

In this case, other circumstances are brought under our notice which most seriously affect the influence which the depositions taken before the coroner would otherwise have upon my judgment. I refer to the ignoring of the two bills by the grand jury. That body is a secret tribunal. We cannot speculate upon the motives which influenced or actuated them in the performance of these solemn duties they are sworn to discharge. We are bound to presume they acted honestly and faithfully, and to give effect to their acts accordingly. We know judicially that the parties who made the depositions before the coroner were also before the grand jury; and that body, hearing their evidence, ignored both bills—that is, they say upon their oaths that twelve of their body cannot agree to find, upon the evidence of these witnesses, a bill either for murder or manslaughter against the prisoner.

The fair and natural inference from these results upon the inquiries before the grand jury is that that body felt that they had not evidence before them to satisfy the consciences of twelve of them that the accused had committed either the crime of murder or manslaughter; and these proceedings therefore so clash with and contradict the depositions, that the legal and inevitable effect of them is to weaken, to a large extent, the influence which they would otherwise have upon the mind of the court, and place the court in a position in which we feel we would not be justified in continuing the prisoner in custody upon these depositions alone,—particularly in a case in which

one term has passed over without putting him upon his trial, and when he is prepared to give bail in amounts satisfactory to the court

Therefore let the prisoner be permitted, on perfecting bail before the magistrates, to appear at the sitting of the Supreme Court in November—himself in the sum of £200, and three sureties in the sum of £100 each.

Mr. Pinsent for the prisoner.

Hon. Attorney General for Crown.

IN RE ESTATE OF JAMES BARR.

1863, *January*. BRADY, C. J.; LITTLE, J.; ROBINSON, J.

Practice—Administration of estate of deceased—Petition of administrator for directions—Jurisdiction of the Court.

When an administrator of an estate finds it in such a condition that the effects are not sufficient to pay and satisfy all the just debts of the intestate, it is not necessary for him to institute proceedings in equity; the law provides him a summary remedy of meeting such a case by petition to the Supreme Court for an order for distribution.

THIS case came before the Court upon a motion by Mr. Whiteway on behalf of W. H. Mare, the administrator of the deceased, for a distribution of his estate amongst some half dozen of persons whose names will appear presently. As the application appeared to me novel and unprecedented, and as I thought the former proceedings of the Court on which the application was founded, and of which I then heard for the first time, appeared to me to be of a similar character, I refused my assent to that application. I will now refer to the proceedings and state the grounds upon which I withhold my assent to the order which my brother judges have agreed to, and protest, as far as I am able, against this case being made a precedent for future proceedings in reference to the properties of deceased persons. In January last the following petition was filed:—

"The petition of William Henry Mare, of St. John's, Newfoundland, Merchant, administrator of the estate of James Barr, late of St. John's, aforesaid, accountant, deceased, respectfully sheweth.—That James Barr, late of St. John's aforesaid, accountant, died in the year of our Lord 1860. That your petitioner was instructed by Messrs. John Stewart & Co. of Glasgow, Scotland, to recover for them from the estate of the said James Barr the proceeds of the sale of a quantity of goods amounting in value to £230 5s. 3d. stg. consigned by Messrs. John Stewart & Co. to the said James Barr in the said year. That your petitioner was informed by Mr. Theodore Clift, of St. John's, aforesaid, commission merchant, that the said goods together with other goods had been delivered to him by the said James Barr in his life time, to sell on the said James Barr's account. That the said Theodore Clift had sold the said goods, and that he had in his hands about £160 5s. 3d. currency which he was willing to pay to the administrator of the said James Barr's estate. That your petitioner applied to your honorable Court for letters of administration to the estate of the said James Barr, to be granted to your petitioner as the agent of the said John Stewart and Co., which letters were granted to your petitioner upon his giving the usual security. That your petitioner has filed his account as such administrator in this honorable Court. That there is now a balance in his hands as such administrator of £158 12s. 9d. currency, which he is desirous of paying as this honorable Court may direct. That he hath been requested by the said John Stewart & Co. to pay the said sum of £158 12s. 9d. to them in part payment of their said claim of £230 5s. 3d. stg. That your petitioner hath caused a notice to be inserted in the *Royal Gazette* of this island requiring the creditors of the said James Barr to furnish their claims, but that no account of such claims, if any, has been furnished to your petitioner. Your petitioner therefore prays that he may be ordered and directed by your honorable Court to pay the said sum of £158 12s. 9d. now in his hands as administrator aforesaid to the said John Stewart & Co. in part payment of their said claim, and as in duty bound will ever pray." The inventory referred to in that petition was as follows: "A just and true inventory of chattels, rights, credits, lands, tenements, and effects which were of the said James Barr, deceased, at the time of his death, and which have come to the knowledge or hands of William Henry Mare, of St. John's, aforesaid, merchant, administrator of the said estate to be administered.

1862.

Cash received from Mr Theodore Clift on account of estate	£167 10 10
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To account paid W. V. Whiteway for professional services in the affair including cash paid by him to clerk of court, and for advertising in <i>Royal Gazette</i>	£ 8 13 1 158 12 9
	<hr/> £167 10 10

This was a petition by the administrator of the estate, who was also the agent of Messrs. Stewart & Co. not for a distribution of the estate of the deceased under the recent Act of the Legislature, but to obtain the protection of the Court in making a transfer of the whole of the available assets to one creditor, and that creditor his own principal, without a particle of evidence before the Court of any debt due to him from the deceased. I am of opinion that that application should have been refused as one wholly unprecedented and improper. The Court however in February last made this order upon it:—"It is ordered that all parties having claims against the said James Barr do furnish their accounts duly attested to William Henry Mare, of St. John's, aforesaid, merchant, administrator of the said estate, on or before the 20th day of May next, when distribution will be made." In the recent sittings of the Supreme Court, Mr. Whiteway applied for a distribution of the fund stated in his former petition amongst the parties I shall presently mention, upon the following affidavit and statement of claim: William Henry Mare, of St. John's, aforesaid, merchant, administrator, maketh oath and saith, that the above order hath been published in the Newfoundland newspapers of St. John's, aforesaid, and also in the *North British Mail* newspaper of Glasgow, Scotland, according to the order of this honorable Court. That the annexed paper marked B, contains a true account of all claims against the said estate which have been furnished to this deponent, or of which he hath any knowledge, in all amounting to £394 6s. 4d., and that *there is now the sum of £141 18s. 10d. currency. in the hands of the said deponent for distribution belonging to the said estate.* The document marked B, above referred to, is as follows. Statement of claims against estate of the late James Barr:—

Thos. McKen	..	..	£10	10	0
McBride & Kerr	..	..	30	0	0
J. W. Prowse	...	..	12	0	0
Estate of Alex. Mills	..	..	55	10	0
John Stewart & Co.	..	..	276	6	4
J. C. Toussaint	..	..	10	0	0
			<hr/>		
			£394	5	4

An account was annexed shewing a balance of the assets remaining in his hands after deducting charges and expenses, amounting to £141 18s. 10d., which he states to be "*Balance remaining in W. H. Mare's hands for distribution amongst creditors.*" and that balance he asks to have the order of the Court to distribute as the amount of the available assets in his hands for distribution. The matter was for some time under our consideration, and the assistant judges finally agreed to this order: "Upon reading the affidavit of W. H. Mare, administrator of late James Barr's estate, and his petition and the other documents filed in this estate in the office of the Clerk of this Court, it is ordered that the realized assets of the said estate be rateably distributed among the creditors of the said estate who have furnished the said administrator with accounts of their claims duly verified, and that the affidavits verifying the same be filed in the Chief Clerk's office forthwith." The latter part of this order relating to verifying affidavits was added to meet some of the objections I raised, but I still feel bound to dissent from the order, and to express my disapproval of the proceedings upon which it is based. The mere reading of these proceedings, and I give them all, must show the unprecedented character of them, and there is not, in my opinion, any legal foundation laid upon which the Court could make any valid order in the case. There is no ground shewn in the proceedings why the administrator should ask for the interference of the Court at all, and I apprehend it will not be questioned that a personal representative is bound to show some ground before he can ask the interference of the Court to relieve him from the responsibilities he has voluntarily assumed. I need hardly observe that it is not because the Court pronounces orders upon parties to do this or to do that, that they can be compelled to comply with them; or, if they obey them, that such orders will afford them protection for what they have done under them. To have that effect and operation they must be orders pronounced in a suit or proceeding duly instituted and regularly

conducted, so as to give the Court jurisdiction to pronounce them, otherwise such orders are wholly invalid and as worthless as the paper upon which they are written. When a party assumes the office of administrator, the law invests him with all the authority over the property of the deceased which the latter had in his life-time, and his first duty is to collect the assets and his next to pay the debts of the deceased, and that without the intervention of any Court of Justice. That is the general rule; but I admit "if he find the affairs of the testator so complicated, as to rendering the administering of the estate unsafe, he may institute a suit against the creditors, for the purpose of having their several claims adjusted by the decree of the court."—*2 Will., Ex. 1624*. There is no such case shown in this instance; but, assuming that there were such a case shewn as would induce the court to interfere, what is the effect of that interference? That the administrator, being unable to distribute the estate, the Court takes it out of his hands and assumes the office of administering it, according to established routine under its own orders, and through its own officers. The Court would refer the cause to the master to do what the administrator found himself unable to do, to take an account of the debts due by the deceased, &c., &c., and when the Court saw the master's report, if there were a fund for distribution, it would next look to the nature of the debts, and if some were specialty debts and ranked prior to others, it would decree a distribution and direct the manner in which it should be made, wholly independent of the administrator, who had ceased, when the Court interfered, to have any further responsibility respecting the estate. There is no analogy between such a case as that and the proceedings in the present case, in which the administrator continues to have and exercise all his powers as administrator, and in which there has been no account taken of the assets, on account of the debts due by the deceased, and in which a distribution of the estate is about to be ordered to be made amongst six claimants upon the estate without a particle of evidence having been laid before the Court that any one of them has a valid claim against the estate for one shilling. But this is not all. When I look into the accounts of the administrator, which have been recognized and acted upon by my brother judges in agreeing to make that order, I find a payment made by the administrator to Mr. Whiteway amounting to over £14 for costs, the correctness of which the judges thus endorse, although the three judges refused an application

made by Mr. Pinsent for precisely the same object, last term, after a week's consideration of the matter, upon the ground that it was an expenditure, which when just, the administrator was authorised to deduct out of the funds in his hands, but in regard to which this Court ought not to interfere, or by its order recognise as correct. Again, I find in these accounts the following charge by the administrator: "Commission for managing the affairs of the estate, £7 18s. 8d.," while the rule of law is that a personal representative is not to have any allowance for the trouble he has had in the discharge of his office, and especially in this case in which Mr. Mare had his principal to look to for remuneration for any trouble he incurred for the benefit of that principal. In 2, Williams on Executors, 1574, the law is thus laid down: "It is a general principle that an executor or administrator shall have no allowance, at law or in equity, for personal trouble and loss of time in the execution of his duties." These amounts are deducted from the funds of the estate in the administrator's accounts, and then the balance of £141 18s. 10d. is struck as the amount of the assets available for distribution, and the order of the Court is made upon the reading of that account and the other documents I have read. But in truth, I do not see why, if these charges were double what they are, they would not be allowed in the same way, for there never was the slightest inquiry, that I can discover, made or directed by the Court respecting them. For these reasons I feel bound to dissent from the order of the Court for distribution in this case, and I have felt it to be my duty to go thus fully into the case in the hope that my observations may lead to a more ample consideration of this subject before this decision should be followed as a precedent for future cases. It will, I hope, be obvious that my observations refer to what I conceive to be the lax, irregular, and unprecedented proceedings throughout the various steps of the Court in this case, and I desire to say that not one word I have uttered should be supposed to convey a reflection upon Messrs. Mare and Whiteway, in respect to whom nothing appears to show that they claimed or obtained anything to which they did not suppose that they were in justice and honesty entitled.

HON. MR. JUSTICE LITTLE:

In this estate an application was made by petition from Mr. Mare, the administrator thereof, to this Court, in the last February sittings, for distribution of the estate. It appeared that he obtained administration by reason of his being the agent of the principal creditor of the estate, who resides in Scotland; that he had duly filed his account of the assets and liabilities in the office of the Clerk of this Court, so far as they had come to his knowledge; that he had advertised for claims on the estate in the *Royal Gazette*, in the usual way, but the Court were not satisfied that a sufficient notice had been given to authorise a distribution to take place at that time. Accordingly they directed that a specific notice, requiring all claims on the estate to be furnished to the administrator by the 20th May last, with a view to a distribution of the assets among the creditors, then should be published in a local newspaper and one newspaper in Glasgow where the intestate had his principal commercial relations out of this colony. During the sittings of this Court last month, the administrator presented an affidavit to this Court, stating that he had complied with this order of the Court, and as the result of the prudent foresight of the Court in making that order, it appeared that several claims on the estate were furnished to the administrator since last February—an account of whose demands was filed by the administrator with his petition. Upon its thus appearing that all claims had been furnished to him, he prayed that he might receive the order of the Court for distribution among the creditors according to law. The amount of the sworn claims on the estate was £394 6s. 4d., and the amount of realized assets was £167 10s. 10d., as appeared by the documents filed by the administrator under his oath. It was the duty of the administrator to satisfy himself that the claims were correct; and he might or might not require claimants to swear to their claims according to the circumstances of each demand. He is not expected to swear to the correctness of the creditors' accounts, but if he has a doubt on the subject, he should require them to attest to them. The question we have to decide is whether the administrator is entitled to an order for distribution under all the circumstances disclosed in the petition and documents on the files of this Court. If the law supplies a summary remedy of meeting a case of this kind it ought to be adopted when an administrator, in the honest and prompt discharge of his duty, finding the estate in such a condition that the estate and effects

are not sufficient to pay and satisfy all the just debts of the intestate, without obliging him, either as administrator or agent of an absent creditor, to file a Bill in Chancery and fritter away the already insufficient estate in useless costs on such a prolix and expensive proceeding as a suit in equity usually is. If there be one thing more than another that would reflect discredit on the administration of justice, it is the procrastination of justice and the consequent accumulation of expenses. No person interested in the estate has opposed the application, and the local Probate Act, 22 Vic., cap. 6, sec. 15, expressly enacts that application may be made by petition to the Supreme or Circuit Courts "for an account of an intestate estate, or for the distribution of such estate," and the Court on hearing the parties may grant or refuse the prayer of such petition. Further, the 25th Vic., cap. 7, sec. 25, enacts, that "when any person shall die in this island or elsewhere, leaving estates within this island or the government thereof, and such estates and effects shall not be sufficient to satisfy all his just debts, it shall be lawful for any of the superior Courts of record or any Judge thereof, either in term time or vacation, on the petition of the executor, administrator, or a creditor of such deceased person, to be made in writing by or upon the oath of such executor, administrator or creditor, to be laid before any of the Courts or any Judge thereof, by which it shall appear to the Court or Judge before whom such statement shall be laid, that the estate or effects of such deceased person are not sufficient to pay all his just debts, to authorise or empower the executor or administrator of such deceased person, or, if they shall see cause any trustee or trustees, they may appoint, to collect and distribute the estate and effects amongst his creditors, according to the manner of distribution by law directed to be made in respect to estates of persons declared insolvent, subject in all cases to the provisions of this Act." Such being the law on the subject, the application of it to the present case, it being for the benefit of all the creditors to have an equal distribution of the estate, which is clearly shown to be insufficient to pay all the debts due by the intestate, can admit of neither doubt nor difficulty. Let the following rule, which has been concurred in by Mr. Justice Robinson and myself, be granted in this matter, only, in conclusion, observing that as it orders a distribution of the "realized assets" of the estate, we have expressed no opinion that can be construed into an allowance of the charge of the administrator for commission in managing the estate or of Mr.

Whiteway for professional services in relation thereto; when a distinct application is made to allow these items, as prior claims, it will be time enough then to discuss them in this case in the proper and deliberate manner in which all questions coming before this Court should be disposed of after hearing the parties concerned, but the rule is made subject of course to all legal and necessary expenses incurred by the administrator.

Upon reading the affidavit of W. H. Mare, administrator of the said estate, and his petition and the other documents filed in this estate in the office of the Clerk of this Court, it is ordered that the realized assets of the said estate be ratably distributed among the creditors of the said estate who have furnished the said administrator with accounts of their claims duly verified, and that the affidavit verifying the same be filed in the Chief Clerk's office forthwith.

THE "EMMA." *

1863, *January*. SIR F. BRADY, C. J.

Shipping—Bottomry bond—Wages of seamen and master earned prior to and after execution of bond, priority of.

Seamen's wages, earned before and after the giving of a bottomry bond, are to be preferred to the bond. No distinction has ever been taken between wages earned before and after the giving of a bond, both are alike preferred to the bond.

A master who gives a bottomry bond, binding himself, ship and freight for a payment of advances, cannot afterwards claim his wages to the prejudice of the bond.

THIS cause was instituted on behalf of John D. Shaw, the holder of a bottomry bond. It appears from the proceedings that in the month of December, 1862, George Hartery was hired as master of the *Emma* by J. & W. Bartlett, her owners, to take charge of her on a voyage from this port to Bristol and back to this port, at £8 sterling per month, from the 15th December, 1862. On the 10th of January last she sailed from this with a cargo and arrived at Bristol on the 23rd of the same month. Having taken in there a general cargo they left

* *Vide Shaw v. Bartlett*, Supreme Court Cases, 1864, p. 85.

the port of Bristol, bound for the port of St. John's. About the 25th of February they experienced a succession of heavy gales, her mast had to be cut away, and part of her cargo was thrown overboard, and they ultimately got into Cadiz for repairs. While at Cadiz the master executed the bottomry bond upon which this cause was executed, and the said Geo. Hartery was "held and firmly bound to John D. Shaw in the sum of £500 sterling, to be paid to the said John D. Shaw, &c., for which payment, &c., I hereby bind myself, my heirs and administrators; and also, the said British vessel, *Emma*, and her cargo of coals, firmly by these presents, sealed, &c." The condition of the bond, after reciting that Hartery had applied to Shaw to lend him the sum of £314 10s. 2d. sterling, on bottomry of the said vessel and her cargo of coals, to pay sundry debts incurred in refitting the said vessel, promised that if the said George Hartery, his heirs, &c., and shall pay unto the said John D. Shaw, &c., the said sum of £314 10s. 2d., together with £62 18s. interest thereon, two days after the arrival of the said vessel at St. John's, or, in case of the utter loss of the said vessel, then the above obligation would be void, else to be and remain in full force and effect. They afterwards, on the 19th July, left the port of Cadiz, and arrived safely at this port on the 19th of August. The amount secured by the bond having been duly demanded from the master and owners and not having been paid, a warrant was issued under which the *Emma*, her tackle, apparel, furniture and goods, &c., laden thereon, were duly arrested by the marshall. Subsequently the consignee of the cargo intervened by Act on petition insisting that the vessel should firstly be held responsible for the amount of the said bottomry bond. The master and mate also intervened by like Acts on petitions, claiming the amount of wages due to them respectively. The ship and cargo were sold by a decree of the court, and the questions I have now to decide relate to the manner in which these proceeds are to be distributed. As to the question raised by the owners of the cargo, and who are, as a matter of fact, the same persons as the owners of the vessel, the position taken is admitted to be correct; but as the fund is an insufficient one, and the proceeds of both the vessel and the cargo will not discharge the amount to which they are in law subject, the owners have no interest in such proceeds. With respect to the claims for wages, it was insisted first, as to all such claims, that wages earned prior to the execution of the bottomry bond should be postponed to the claim

of the holder of that bond; and secondly, that as respects the claim of the master, it could not be maintained for any wages whatever, whether earned before or after the execution of the bond, against the rights of the bond holder. As to the first question whether the seamen have a right to claim for wages earned by them before the execution of the bottomry bond in priority to the claim of the bond holder against the proceeds of the vessel and cargo? Mr. Hoyles, for the bond holder, and Mr. Pinsent, for the seamen, sustained the rights of their respective clients with great ability and research, and at the close of the argument the question appeared to be, from the authorities relied on, in a very unsettled and perplexing position. Since the argument, however, Mr. Carter has kindly furnished me with a very recent decision which is conclusive, and removes the doubts and difficulties which had previously existed. That decision was in the case of the "*Union*," *Lushington's Rep.*, 128, in which it was ruled that "seamen's wages earned before the giving of a bottomry bond are to be preferred to the bond," and, in giving judgment, Dr. Lushington said: "What, then, is the law in this court as to the relative rights of a bond holder and seamen suing for wages earned before the bond? I have, in the cases quoted—the *Mary Ann*, the *Janet Wilson* and *Jonathan Goodhue*—intimated an opinion that the bond holder ought to be preferred, because the bond has been auxiliary to the saving of the wages, because it has saved the fund to which the seaman is resorting. I have, however, never decided the question. Upon an examination of all the cases, and upon investigation of the practice of the Court, I find that no distinction has ever been taken between wages earned before and wages earned after a bond, that in practice both have been alike preferred to the bond. I think it better that the ancient practice of the Court should not be disturbed. I decide, therefore, that the claim of the seamen in the present case is superior to the claim of the bond holder, and, therefore, to the claim of the owner of the cargo, who derives through the bond. I pronounce for the seamen's claim, and refer the amount to the registrar." I feel bound to follow that decision and allow the claim for wages for the mate and seamen earned before as well as after the execution of the bond, and refer it to the registrar to ascertain the amount due to each of the claimants. The next question relates to the claim of the master for his wages, to which Mr. Hoyles objects upon two grounds: 1st, that the master cannot, like the seaman, charge these proceeds in Ad-

miralty; to which Mr. Pinsent replies that, although the law was so formerly, now by the 17, 18 Vic. c 104, s. 191, the master has all the rights and remedies for his wages that the seamen have; which Mr. Hoyles answers by insisting that that provision does not apply to the case of a colonial ship owned and registered in the colony, and arrested within the jurisdiction of that colony;—and 2nd, Mr. Hoyles contends, even supposing that section would give the master the general right to proceed in this country against this vessel for the recovery of his wages, that he has debarred himself of that right in this case by executing the bottomry bond, and thereby making himself personally liable for the amount of it to the bond holder. As to the question whether the 191st section of the "Merchant Shipping Act" extends to this case? I find that in "*The Rajah of Cochin*," 1 Swabey, 478, it is expressly ruled that that Act applies to the colonies, and that "by the 191st section a master has a lien for his wages in the Vice-Admiralty Court, whatever may be the municipal law of the colony." Dr. Lushington in his judgment refers to another section, which enacts that "The legislative authority of any British possession shall have power, by any Act or ordinance confirmed by Her Majesty in Council, to repeal, wholly or in part, any provision of this Act relating to ships registered in such possession, but no such Act or ordinance shall take effect until such approval has been proclaimed in such possession, or until such time thereafter as may be fixed by such Act or ordinance for the purpose"; a provision which appears to me to answer the distinction which Mr. Hoyles took in this case upon the ground that the *Emma* was registered in this country. I will, therefore, assume that the master in this case has, under the 191st section, all the rights and remedies for the recovery of his wages as seamen have for theirs, "so far as the case permits," and it only remains to be considered whether he has not debarred himself of his right to claim against the ship, or the proceeds of the sale of it, in priority to the bond holder, by executing the bottomry bond? And in my judgment, after much consideration, he has. I cannot discover any sound or substantial distinction between this case and the case of the "*William McPhee*," 1 Swabey, 346, cited by Mr. Hoyles, and there it was decided that "A master and sole owner, having given a bottomry bond, binding himself, ship and freight, cannot claim his wages to the prejudice of the bond holder," and that was ruled upon the sole ground that "By the terms of the

bond the master binds himself, pledges his own credit, as well as hypothecates the ship; by this he becomes debtor to him who advances the money; he appears in the bond in a double capacity—as pledging his personal credit and hypothecating the ship." Now, that is precisely what the master in this case has done, and while Dr. Lushington in that case admits, as a general rule, that masters have now the same rights and remedies as seamen, he says, "I think it would be a gross injustice to allow the claim of a master and sole owner for wages, as against the man to whom he is personally a debtor." Upon these grounds I must disallow the claim of the master for wages in priority to the rights of the bond holder.

A decree was then pronounced referring it to the registrar to ascertain the amount due to the mate and seamen respectively for their wages and their costs in this cause, and that same, when ascertained, should be first paid out of the proceeds of the ship and cargo; and also, to ascertain the amount due to the bond holder on foot of his security and for his costs in this cause, and that same should be paid to him out of the residue of the said proceeds; reserving liberty to all parties to apply to the Court in case it should hereafter become necessary to do so.

PINSENT v. BOYD & McDOUGALL.

1863, *January*. BRADY, C. J.; ROBINSON, J.; LITTLE, J.

Prætiæ—Application for procedendo—Quashing certiorari—22 Vic., cap. 7, sec. 25.

The writ of *certiorari* to hear and determine a cause can only be had in cases in which the Superior Courts can administer the same justice to all parties as the Court below, but where the inferior Court has jurisdiction and the Court above has not a *certiorari* cannot be had.

There is no precedent for a writ of *certiorari* to issue to have a cause removed for hearing on the merits in the Superior Courts in a case where the Court below was empowered by statute to hear and determine causes in a manner not according to the course of the common law, but out of the course of that law.

In this case I am of opinion that the writ of *certiorari* ought to be quashed as having been impropriately issued, and a *procedendo* as asked for by the Attorney General awarded; or, in other words, that this cause should be sent back for adjudica-

tion to that tribunal upon which alone in my judgment the Legislature, in its omnipotence, has conferred jurisdiction to hear and determine it. I wish to guard myself from being supposed to decide that the remedy by *certiorari* is taken away in proceedings under the section of the Act upon which this case has arisen; on the contrary, I am of opinion that if the inferior tribunal should proceed irregularly or informally, or in any respect exceed the jurisdiction conferred upon it, this court would be authorised to grant a writ of *certiorari* to review the proceedings of the inferior court, and either quash or confirm as it appeared to them justice required, the order or adjudication made in the court below. Nothing of that kind is relied upon in the present instance, but the removal of the cause is based simply upon the ground that the defendant prefers the decision of the Supreme Court to that of the Sessional Court. It would be a palpable absurdity for this court to remove a cause for hearing if it had not jurisdiction to hear and determine it upon the merits, and to do justice between the parties litigating in the court below; and in my opinion we have no jurisdiction to hear and determine the *merits* in the cause now under our consideration. In the first place Robert J. Pinsent could not institute proceedings in his own name in any court of justice to recover these rates and assessments, because the *legal* interest in them was not vested in him, but in the company of which he is the servant or agent, were it not for the authority given to him by the 25th section of the Act to sue in his own name in the Sessional Court; and secondly, this proceeding is for a sum of £15, which the Sessional Court is authorised to entertain and determine, while this court has no jurisdiction to entertain a suit in a summary way for any sum exceeding £10—either at common law or by statute. The Act of the Legislature conferring a summary jurisdiction upon this court to the extent of £10 is, perhaps, the simplest and most satisfactory evidence that we have no such jurisdiction, save so far as the Legislature confers upon us; and it is hardly necessary to cite authorities to establish the position that Mr. Pinsent can only institute these proceedings in his own name by force of a legislative enactment empowering him to do so. In *Chitty on Pleading*, 2, the law is thus stated, "In general the action on a contract, whether express or implied, or whether by parol, or under seal, or of record, must be brought in the name of the party in whom the *legal interest* in such contract is vested"; and again, in page 7, it is said, "In general a mere servant or agent, with whom a con-

tract is expressed to be made on behalf of another, and who has no direct beneficial interest in the transaction, cannot support an action thereon. Therefore where A, by a memorandum in writing signed by himself only, agreed in writing to pay the rent of a certain toll which he had hired to the treasurer of certain commissioners, it was decided that no action for the rent could be supported in the name of the treasurer, the contract being in legal contemplation with the commissioners, and to pay them. And were several persons took a lease of premises to be used as a Jewish synagogue, and the seats therein were let by an officer annually appointed, whose duty it was to let them and receive the rents and apply them partly in payment of the rent secured by the lease and partly for general purposes connected with the establishment, it was held that the lessees were properly made the plaintiffs in an action to recover the rent due from an occupier of one of the seats." But "There are various Acts of Parliament which, without incorporating certain bodies of individuals, &c., enable them to sue, and entitle others to sue them, in the names of their clerks, treasurers, &c, for the time being. Thus, by the General Turnpike Act, the trustees and commissioners of any turnpike road may sue and be sued in the name of one of the trustees, or of their clerk or clerks for the time being—that is, at the time the action is brought. The West India Dock, the London Dock, and some Insurance Companies, may sue or be sued in the names of their treasurers or clerks."—*1 Chit. on Pleading, 15.* The enactment in the 25th section therefore being, in these respects, introductory of a new remedy and creating a new jurisdiction, not according to the course of the common law, but in derogation of it, the court is bound to construe it strictly and not extend it beyond its express words; and where these apply to proceedings in the Sessions Court alone, they cannot by any strained interpretation be held to embrace this court, or confer any new jurisdiction upon it. This being the view of the case I take so far, I will now state from a work of the highest authority the rule of law which guides my decision in this case, and I have not acted upon the law so laid down until I carefully examined the authorities upon which the author relied in support of it, and which were to my mind perfectly conclusive. In *1 Tidd's Prac. 398*, the law is thus stated, "The writ (a writ *certiorari* to hear and determine a cause) can only be had in cases in which the Superior Court can administer the same justice to the parties as the court below; but where the inferior

court has jurisdiction and the court above has not, a *certiorari* cannot be had." Again, in *Hartley vs. Hooker*, 2 Cowp. 523, it was said by Lord Mansfield in giving judgment that, "If a new offence be created by statute, and a special jurisdiction out of the common law is prescribed, it must be followed. If not strictly pursued, all is a nullity and *coram non iudice*, and objections may be taken in any stage of the cause." Although this decision related to a criminal case, the doctrine laid down by the court is equally applicable to this case and rules it, for if the word "remedy" be substituted for the word "offence," the doctrine would be just as sound law. Upon the same ground it was held in a number of authorities that proceedings in *foreign* attachments could not be removed by *certiorari*, because not being according to the course of common law the Court of Queen's Bench had no jurisdiction to hear and determine them; and in *Smith vs. The Mayor of London*, 6 Mod. 78, a case of *foreign* attachment, the court said, "And here they said there could be no *certiorari*, because they could not proceed in this court according to the custom of London." Any one who may feel a desire to see the whole law upon this subject, will find it in a most elaborate and learned judgment of Lord Eldon's, when Lord Chief Justice of the Common Pleas, in delivering the opinion of the twelve judges in *Beard vs. Webb*, 2 Bos. & Pul. 93. It appears to me that the difficulty in this case has arisen from not distinguishing between the cases in which a *certiorari* issues for the purpose of having the cause heard and determined in the Superior Court, and those in which it issues to *review* summary orders and decisions of inferior tribunals not to hear and determine them on the merits, but to confirm them if right or quash them if erroneous or illegal. Much stress was laid upon a class of cases in which the writ was granted, although there were words in the Acts declaring that they should be *finally* determined in the Sessions Court, and that no other court should intermeddle with them. A careful examination of this class of cases will shew that they do not sustain the application in this case (which is to have the case heard *upon the merits*), but that they were cases in which the writs issued after adjudication in the inferior court, merely to enable the court to *review* the decisions of the court below, as it is said in *Chambers case*, 2 Roll. 471, "*A certiorari ad informandum conscientiam*," upon which the court does not enter into the merits of the cause, but merely confirms or quashes the decisions of the inferior courts. Thus, in *Rex vs.*

Mosely, 2 Burr. 1041, the leading case on this point, the court uses this language in granting the *certiorari*, "A *certiorari* does not go to try the *merits* of the question, but to see whether the *limited jurisdiction* (or in other words, the inferior jurisdiction) have exceeded their bounds." Again, in *Dr. Greenville vs. The College of Physicians, 12 Mod. R. 390*, the court said, "The general reason of the law is that wherever a jurisdiction is set up by Act of Parliament (as in this case) a *certiorari* will lie to remove their proceedings," and "because it is a new way of proceeding unknown to the common law, the party has a good remedy by *certiorari*, as it is a consequence necessary on all such particular jurisdiction that the record of their proceedings may be brought up here, (but for what purpose?), that this court may examine whether *they have kept themselves within their jurisdiction*." In *Rex vs. Inhabitants Glamorganshire, Ibid 403*, the court said, "Wherever there is a particular jurisdiction set up by Act of Parliament, this court may command the execution of it by a *mandamus* and remove their proceedings here by *certiorari* to see whether they have *observed their authority*." These authorities, and they are followed in every treatise on this subject, satisfactorily prove the purpose for which the writ of *certiorari* lies in all cases of summary convictions and summary orders made under special and newly created jurisdictions out of the course of the common law; they shew that, instead of exercising the new jurisdiction itself, the Court of Queen's Bench will if necessary compel the inferior court to exercise it, and it will grant a *certiorari* to see that court exercises such jurisdiction properly and legally. The express grounds upon which the courts hold that the *certiorari* lies, in those cases in which the judgment of the inferior court are by the statute declared to be "final," are that the meaning and true construction of these enactments is that the decisions of the courts below should be final as to the *facts* and the *merits* of the case, but not as to any error committed in point of *law*, and that as no writ of error lay to remove such summary orders or convictions, the *certiorari* would issue to review them, but not to hear and determine them. I will only add that I have frequently asked, during the consideration of this case, for a single instance in the books in which a writ of *certiorari* issued to have a cause removed for hearing *on the merits* in the Superior Court in a case where the court below was empowered by statute to hear and determine causes in a manner not according to the course of the common law, but out of the course of

that law ; and no such precedent was shewn to me, nor could I discover any such case. There was another class of cases also strongly relied on, in which it was held that a party having a remedy by statute in an inferior court was not thereby deprived of his common law remedy in the Superior Court, but that the new remedy was cumulative upon the old and that such party might adopt either. The case of *Stanley vs. Wharton*, 9 and 10 Price, was chiefly relied on, but I own I could not discover how that case sustained the defendant's argument in this case. It ruled that the remedies in the two courts were cumulative, and so far it would be an authority to shew that the remedy given to the Water Company in the Sessions Court to sue in a summary way and in the name of their collector was cumulative upon their common law remedy to sue as a body in the Superior Courts; but in what respect it advances one *iota* the position that the Supreme Court has jurisdiction to hear and determine a cause for the sum of £15 in a *summary way*, or to entertain that or any other cause where R. J. Pinsent sues on behalf of the company, is what I cannot discover. It has been also suggested that when the proceedings are removed to this court by *certiorari* it would be competent to change the name of R. J. Pinsent, the plaintiff in the court below, to that of the company, and the form of the proceedings from a summary one to an action at common law, and thereby bring the case within the jurisdiction of this court; but I am not aware that this court possesses any such power or authority against the will of the plaintiff in the court below. Observe what would be the effect of such a proceeding. If it could be adopted in one case it might be adopted in every case, and thus the plaintiff in the court below, and the company of which he is the agent, would be wholly deprived of the simple, speedy and inexpensive mode of recovering the rates which the Legislature had in express terms provided, and the 25th section would thereby be nullified by the power of this court as fully and completely as if it were struck out of the Act, or repealed by the Legislature! I know of no power in this court above the written law of the land, or which would thus enable it to abrogate that law, or deprive the subject of new privileges, remedies and rights expressly given to him by Parliament, and which he had not at common law. But this court will see that the *new jurisdiction* so created shall exercise its functions properly and legally, and for that purpose will in proper cases

grant a *certiorari* to review them, but not, as is sought in this case, to hear and determine them.

Let the rule in this case to quash the *certiorari* and award a *procedendo* be made absolute.

HON. MR. JUSTICE ROBINSON :

I have given much consideration to the arguments which have been ably urged on both sides; and, with every desire to extend to the defendants their common law right of trial by jury and the supervision of the Supreme Court, I am reluctantly coerced by the terms of the Act 22 Vic., cap. 7, sec. 25, to rule that the *certiorari* obtained in this case be quashed, and a *procedendo* awarded. There are two objects for which a cause from any inferior Court may be removed by writ of *certiorari*. One to review the judgment of the inferior tribunal for the purpose of seeing that it has not exceeded its jurisdiction and has acted according to law—the other for the purpose of hearing and determining the cause itself in the Court above. Under the latter category, the present case is classed; and it is a maxim of law that a *certiorari* to remove a cause for trial, will never lie where the Court above is not enabled to do justice by hearing and determining the case, for it would be an obvious interference with justice to remove a cause from a tribunal which by law is competent to try it, to one which is not competent. It must be borne in mind that the plaintiff on the record is not the "Incorporated Water Company," but "Robert John Pinsent, collector of water assessments." Now the Court can only examine the record before it, and the plaintiff on that record has no common law right to sue in any Court in his own name, for a debt due to the Water Company, and the sole authority which enables him to maintain any action is the 25th section of the statute 22 Vic., cap. 7, which provides for the recovery of the assessment in a particular way and place, viz., in a summary manner in the Court of Sessions for the central district—and in the name of the collector, this special authority contrary to the course of the common law must be strictly pursued, and I am of opinion that this plaintiff has no *locus standi* in any other Court than the Court of Sessions for the C. D., and that the S. C. is not by law authorized to try the cause removed—the writ of *certiorari* is therefore by necessary implication taken away, and the matter must be remitted to that Court which alone can dispose of the case in its present shape. Had the

"*Water Company*" been authorized to sue in a summary manner before the Court of Sessions, I should have held that that summary remedy would be cumulative, and would not have tolled the right of this Court to remove the cause into it, and try it according to the course of the common law, under the provisions of the 1st section, but such is not the enactment, and I can see substantial reasons in a fiscal point of view for the Legislature acting as it has done. In thus expressing the opinion that the Supreme Court cannot hear and determine the facts in this cause, I am only disposing of the case that is now before the Court; I do not by any means determine that if the Court below should make a mistake in matter of law, that its judgment cannot be received and rectified by this Court as regards any error of law apparent on the record. I think it would have been satisfactory if the action for the recovery of a tax like the present—new in its character, and large in its amount—had been, at any rate, appealable to the S. C.; but the Legislature has thought otherwise, and we have only to administer the law as it is. I think the rule *nisi* should be made absolute, but without costs.

HON. MR. JUSTICE LITTLE:

This is a rule *nisi* for a *procedendo* for the purpose of setting aside a *certiorari* issued by the defendants for the removal of this cause from the Court of Sessions into this Court. The subject of the action in the Court below is a claim of £15 9, currency, made by the plaintiff, as collector of water rates and assessments imposed by the General Water Company of this town, being 3½ per cent. on the alleged annual rent value of defendants' house, &c., for the assessment, and 7½ per cent. on the same value for the water rate charged to them, and for the recovery of which a summons was issued by the plaintiff under the 22 Vic, cap. 7, and the Vic., cap. relating to the incorporation of the company, the first of which authorizes the collector "to collect from the parties respectively liable their contributions towards such assessments; and in case any person so liable shall neglect or refuse to pay such contribution, the same may be recovered, with costs, in a summary manner by a suit in the Quarter Sessions, to be brought in the name of the collector." After the service of the summons and before the trial, the *certiorari* was issued, upon an affidavit stating the nature of the demand and a Judge's *fiat* granted thereon. It is laid

down in *2 D. & R.*, 409, *3 Dowl.* 90, and *2 Arch. Prac.* 1153, 5, that the *certiorari* lies of course, in all cases, before judgment, with certain exceptions meantime; but in some cases you are obliged to obtain the leave of a Court or a Judge to serve out the writ, but this is only necessary on removals from Courts constituted under the 9 & 11 Vic., cap. 95, and also, it seems, on removals from the Courts of the counties palatine. In other cases no such leave is necessary, and the writ must be sued out as a matter of course. Such is the practice observed in this Court until recently, and the change suggested, and in fact followed, though not in strictness necessary, has been to require an affidavit of the nature of the action in the Court below, and a Judge's *fiat* thereon to warrant the issuing of the writ. This alteration, I must observe, was designed to prevent the too frequent removal of frivolous causes. Of course an affidavit and Judge's *fiat* or rule of court have been always required for the removal of a cause after judgment, or of criminal proceedings, for in such cases it is not granted as a matter of course, but is made according to the circumstances, either granted or refused.

The question we have to decide is, whether the *certiorari* lies in the present case. In *R. vs. Hanson*, *2 B. & Ald.* 521, it is said a *certiorari* always lies unless expressly taken away, and in *1 Burns Ins.* 553, it is laid down "except where a statute otherwise directs, this writ of *certiorari* lies in all judicial proceedings in which a writ of error does not lie, and it is a consequence of all inferior jurisdictions created by every Parliament, to have their proceedings returnable in the Queen's Bench, and therefore, a *certiorari* lies to Justices of the Peace, even in such cases as they are empowered by statute finally to hear and determine, and the superintendence of the Court of Queen's Bench is not taken away without express words, (*2 Hawk.*, cap. 27, sec. 23), for the *certiorari* being a beneficial writ for the subject, cannot be taken away without express words. If, therefore, a statute authorizing a summary conviction before a magistrate give an appeal to the Sessions, who are directed to hear and finally determine the matter, it does not take away the *certiorari* even after such an appeal made and determined—*S. Jukes*, 8, *J. R.* 542. So although the *Conventicle Act*, 22 Car. 2, cap. 1, enacted that no other Court whatever should intermeddle as to take way any causes of appeal upon that Act, but that they should be *finally* determined in the Quarter Sessions *only*; yet it was decided that the Court of Queen's Bench was not ousted of its right by

certiorari—4 Burr. 1040. So where a new offence is created by statute and directed to be tried in an Inferior Court, if such Court be established according to the course of the common law, all the common law consequences attach upon the proceedings, one of which is that the indictment may be removed into the Court of Queen's Bench, 4 Mol. 508.

Now, the Acts for the incorporation of the General Water Company contains no provision expressly taking away the writ of *certiorari*, but they expressly authorize the company as a body corporate to sue and be sued in all courts; and while the 13th section of the original Act 22 Vic., cap. 7, authorises this Court to appoint an arbitrator, in case of refusal by either party, to ascertain the compensation for lands taken or damaged by the company, the 14th section expressly authorises the company to sue any person who shall wrongfully take or waste the water for a penalty not exceeding £10, to be recovered in any court of record. It cannot be doubted that if proceedings were instituted in the Court of Sessions under this section, they would be removable in this Court by *certiorari*; but although a person who wrongfully takes the water of the company can have this right it is contended that under the 25th section authorising the collector to sue for the assessment in the Court of Sessions, that the person rightfully taking it has in law no such privilege, that this Court cannot proceed in a summary manner in this action in the name of the collector, and therefore the writ of *certiorari* is taken away by implication. Supposing the Act contained no provision as to the Court, or mode in which the assessment should be recovered, the common law would step in and supply the remedy, once the Act created the debt to the company, and that remedy would be to sue the party either in the Court of Sessions, if the claim was not more than £5, or if more, in any of the superior courts. It therefore appears to me that the summary remedy afforded by the 25th section is only cumulative of the common law right of the company to sue in any Court of Record simple or facile means of recovering the assessment; but if the company have the double remedy by common law and summary proceedings, so likewise in my judgment have the parties proceeded against equal rights in their defence to have their cause decided in the Court of Sessions or removed to this Court for adjudication according to the course of the common law. This view is sustained by Stanley v. Wharton, 9, Price, 301, which was an action of debt founded on the 11th Geo. 2, for assisting a ten-

ant of plaintiff in fraudulently removing goods. It was urged in the defence that as the value of the goods was only £42, the landlord's remedy ought to have been by application to two magistrates under the 4th section of the statute, which enacts, that where the value of the goods should not exceed £50, it shall and may be lawful for the landlord to exhibit a complaint in writing against such offender before two or more justices, &c., who were to summon defendant and determine the matter in a summary way by adjudging the offender to pay the double value. The Chief Baron Richards, in his disposing of this objection, says that the language of the Act of Parliament does not bear it out; for there is nothing which makes it necessary, that where the value of the goods does not amount to £50, the landlord must go before two magistrates. It might be more convenient for him to do so, and in that case he may do so; but that there is nothing imperative on him in the 3rd section. Again, in *Sharp v. Warren*, 6, Price, 131, which was an action of assumpsit by the treasurers of a benefit society, established by Act of Parliament, which expressly authorized them to adopt in such cases a summary proceeding, by petition, to the Court of Chancery or Exchequer, and it was therefore contended that this action would not lie, but the particular mode of proceeding pointed out by the statute ought to have been adopted. This objection was, however, overruled, the court observing, "As to the specific remedy given by the statute, it is clear that does not preclude the plaintiff from suing the defendant in a court of law. That does not deprive the plaintiff of any pre-existing right. It gives merely an additional remedy, and all the remedies are concurrent, and the plaintiffs may choose whichever is most suitable to their case. * * * If the statute had been imperative on the officers of the society, in directing them to proceed by the extraordinary mode of petition only, the objection could only have weight, but as it has not done so, we must take it the Legislature gave the society the more summary remedy in addition to whatever they might otherwise have had." The 22nd section of the Judicature Act, constituting the Courts of Sessions in this Island, expressly authorizes them in a summary way to take cognizance of all suits for the recovery of debts not exceeding forty shillings, and of fishery servants wages to any amount, and declares that the judgments of this court shall be final. Still, it has not been urged, either in this case or any other that I am aware of, that this provision of the Act took away the common law right *certiorari*. Further,

under the last Act for the regulating the practice of the Northern and Southern Circuit Courts of this Island, the presiding judge therein is authorized to hear and determine all causes in a summary manner. But as a matter of fact, if a cause for a debt of £50 be transferred from any of these Circuit Courts into the Supreme Court, it is here not in a summary way, for the summary jurisdiction of this court is confined to £10 stg, but in the ordinary common law course by a jury. A *certiorari* removes the record in a cause from the inferior Court; but though the record be brought up on this writ into the court above, yet they do not take up the cause where the record leaves off, but begin the whole proceedings *de novo*; the plaintiff may declare in this court as he pleases, and is not confined to the same species of action as he declared in below.—*1 Tidd, 411.* But it is urged that the action cannot go on in this court in the name of the plaintiff, who sues as the collector for the Water Company, as the act only authorizes him to sue in the Court of Sessions. I do not see how the defendants (if they were disposed to take the exception assumed by the plaintiffs) could urge a purely technical objection of this kind to the claim in this court if the Act confers on the plaintiff the right to recover in the Court of Sessions and the cause be brought up at the instance of the defendants. It is not thus that the common right of the subject to have his defence heard and his cause tried in this court can, in my opinion, be taken away. The plaintiff, as a matter of convenience, is empowered to sue in his own name as collector, for assessments under the first Act; but in 2, Walford, 1130, it is said in treating on the rights of corporate companies, like the Water Company, to sue in the name of a particular officer, that although a body of this kind be privileged by the law of its constitution to sue and be sued like a pure corporation, yet it does not follow that all actions by or against the body must be brought in that way and no other; except, indeed, where the privilege is given by some statute which either expressly says that no one else shall sue but those designated by its provisions, or which requires to be so constructed for the furtherance of the objects contemplated by the Legislature in passing it. It appears to us that if the plaintiff has no right to proceed in this court for the recovery of the $3\frac{1}{2}$ per cent. assessment on defendant's house, &c., claimed in this action, he has no right in law to proceed in the Court of Sessions for that amount, as for the water rate of $7\frac{1}{2}$ per cent. imposed on defendants, and claimed in this action, and

the action then ought, in that view, to have been confined merely to the $1\frac{1}{2}$ per cent. annual assessment on defendant's house, &c., which is the maximum per centage that could be imposed on that head under the 22nd Vic., cap. 7, which authorises the Governor in Council to appoint appraisers and a collector "for the purpose of ascertaining the amount of such assessment and of collecting and receiving the same," and requires the return of the appraisers to be revised by the Court of Sessions. The duty of the collector is then after the revision is completed to "collect from the parties liable in that behalf their contribution towards such assessment; and in case any person so liable shall neglect or refuse to pay such contribution, the same may be recovered with costs in a summary manner by a suit in the Court of Sessions for the Central District, the suit to be brought in the name of the collector."—Sec. 25. It will be observed that there is no express authority given in this section or any part of this Act to sue for the water rate, only for the assessment to the extent of $1\frac{1}{2}$ per cent. on the annual value of the house, &c. Now the 26th Vic., cap.—, authorizes the imposition of such assessment and rates as may be necessary for the purposes of the company. Under this provision the assessment claimed in the summons is $3\frac{1}{2}$ per cent., being double the amount authorized to be imposed by the first Act, and the water rate claimed in addition under both Acts is $7\frac{1}{2}$ per cent. Now the assessment and rates authorized to be charged under the last Act (26th Vic., cap. 4) are to be levied and collected in the manner provided in the former Act (22 Vic, cap. 7) which simply states that the collector shall collect from the parties liable their contribution towards such assessment, making no provision for the recovery of the water rate, and the provision to which I have referred only relates to the assessment; while the last Act (26th Vic) contains no provision authorising the collector to sue for or recover by action in any court the assessment or rates to be thereby imposed, but merely states the same shall be "levied and collected" in the manner provided by the former Act. Now, "to levy" means in law to collect or exact, and confers no more power than the term "collect." If then under this aspect of the collector's powers, this objection to his claim to sue in the Court of Sessions for any more than $1\frac{1}{2}$ per cent. assessment chargeable under the first Act, be tenable, it would follow that the Court of Sessions would have no jurisdiction in the case beyond that amount and to the extent of its ordinary limit of

£5 in actions of debt: and therefore in such a view, the cause could be removed into this court. But I do not rest my judgment upon this construction of the Act. I regard the reasonable intent of the Legislature as disclosed in the Acts in a more liberal and comprehensive light to give practical effect to the powers conferred, while I do not, at the same time, undertake to decide that there is no considerable weight in the objection as urged against the position taken on the plaintiff's behalf in this case. It is sufficient for me to say in conclusion, upon the whole case, after the best consideration I have been able to give to it, that in my judgment the *certiorari* has been legally issued and the rule for a precedent should be discharged; that as civil actions of this nature are of common right removable in this court, and that remedy has not been expressly or by necessary implication taken away by any enactment of the Legislature, bearing on the present case, that as in all such Acts of the Imperial Parliament, especially on such subjects as the imposition of taxes, where it is intended to take away the subject's right of *certiorari*, that intention is expressly dead on the face of the act or the implication is beyond all reasonable doubt, that as the writ is obtainable as a matter of course before trial, it would seem to me that I should be denying justice to the defendants if I refused them an opportunity of a trial on so new and important a question as this annual tax on them and the property, before this Court and a jury, according to the course of the common law.

1863, January. SIR F. BRADY, C. J.

Magistrate—Liability for not complying with provisions of 7 & 8 Geo. IV., cap. 64, sec. 1, and 11 & 12 Vic., cap. 42—What is a sufficient justification for magistrate.

Where it appeared that warrants had not issued by the magistrate for the arrest of certain parties, against whom information had been sworn, and further that the accused had not been arrested or held to bail, nor had the witnesses been bound over to appear and give evidence, the court held it to be a sufficient justification for the magistrate, and relieved him from the penalties for non-compliance with the provisions of 7 & 8 Geo. IV., cap. 64, and 11 & 12 Vic., cap. 42, by it appearing to the satisfaction of the court that there was not at the disposal of the magistrate a sufficient naval or civil force to enable him to enforce the law.

UPON reading the depositions in this case it is ordered that William Hooper, Esq., J.P., show cause by affidavit or affidavits, first, why warrants were not issued to arrest the parties or any of them against whom I. and A. Street swore informations; secondly, why the accused were not arrested and committed, or held to bail to stand their trial; thirdly, why the witnesses were not bound by recognizance to appear and give evidence upon the trial of the accused; and lastly, why the said William Hooper, Esq., should not be fined for non-compliance with the requisitions of the 7 & 8 Geo. IV., cap. 64, s. 1, and the 11 & 12 Vic., cap. 42, respecting the foregoing matters; and also in the case of

The Queen at the Prosecution of John Fleming v. Frederick Spavn, for assault and attempt to stab, to show like cause as in previous case; and in the case of

The Queen at the Prosecution of Thomas Birkett v. Samuel Brenton and Others, for larceny of property belonging to the Anglo-Saxon.

Upon reading the depositions, it is ordered that Wm. Hooper and John O'Neil, Esqrs., J.P's., show like cause as in first cause above; and in the case of

The Queen at the Prosecution of Patrick Power v. Henry Brown, for larceny of seven barrels flour.

Upon reading the depositions in this case and the examination of the accused, it is ordered that William Hooper and John O'Neil, Esqrs., J.P's., show cause by affidavit or affidavits why the witnesses were not bound by recognizance to appear and

give evidence upon the trial of the accused, and also why the statement of the accused was taken upon oath, contrary to law.

BURIN, 1st September, 1863.

*The Queen at the Prosecution of Isaac
and Abraham Street,*
vs.
*Joseph Kirby and Others—and
in other cases.*

In these cases I felt coerced to pronounce a rule upon Messrs. Hooper and O'Neil, Justices of the Peace in this district, against which Mr. Hogsett, on behalf of these gentlemen, shewed cause yesterday. I will now briefly state the circumstances of the first case. The prosecutors, Isaac and Abraham Street, with their crew, were carrying on the fishery with their cod-seine, and upon the good fortune and success of their honest industry in that lawful pursuit the existence of themselves and their families depended during the ensuing winter. While they were so engaged they were set upon by a body of men filling two skiffs, who were armed with fire-arms, hatchets and other deadly weapons; their seine was cut in pieces, and they were assaulted and severely beaten. They appeal to the law of the land, they swear informations against such of their assailants as they could identify; they attend upon this court and prefer bills of indictment against them; the grand jury find true bills, one for the destruction of the cod-seine, and two others for assaults upon each of the Streets. These proceedings entail on the prosecutors a most serious loss in the neglect of their fishery. The accused are called upon to appear to take their trial, and they do not answer, and thereby after a delay of a week there is an utter failure of justice, at least at this sitting of the court, because the parties were not arrested and either committed or held to bail to stand their trial.

With such facts before me, I would ask how can the prosecutors, or any one who witnesses or hears of such a result, regard it otherwise than as a perfect mockery of justice? I have also before me the following record of a proceeding before Mr. Hooper, the stipendiary magistrate of this district: "Sessions Court, noon, 28th August, 1863. John Drake, Richard Drake, and John Walsh, all of Mortier Bay, were brought before Wm. Hooper, Esq., charged with taking a bultow from a boat belonging to John Curtis, and for afterwards going to his house

and threatening if they found him using the bultow on the fishing ground, they would sink the boat and drown himself. The parties were accompanied by a considerable number of persons, who all appeared to be partizans of the accused, and by their unruly conduct prevented the magistrate from adjudicating on the case, there not being a sufficient force to keep order. (Signed), Edward Morris, C.P." How, let me ask, in the name of law and order, has this district fallen into this terrible condition, and who is responsible for it? Lawless bandittis, armed with guns, hatchets and other deadly weapons, determine that at Lawn, to the westward of this place, that the cod-seine shall not be used in the fishery, and that if used it shall be cut up and destroyed, and resistance by the owners is at the peril of their lives; and in another part of the bay to the eastward of this place, Mortier Bay and Flat Islands, the same course is adopted against all those who fish with the bultow by similar lawless bandittis, who also destroy the fishing gear and threaten the lives of the owners; and when the latter appeal for protection to the laws of the land, the same lawless ruffians throng the court of justice, intimidate the magistrate, defy him to entertain the complaint against those whose partizans they are, and retired triumphant, having trampled contemptuously upon all law and justice! Such a condition of society, I need hardly say, demanded from me the most searching investigation and inquiry within the scope of my authority, and which my brief stay here enabled me to make, and with that view I was compelled to pronounce the following rule:—"That Wm. Hooper shew cause why warrants were not issued to arrest the parties, or any of them, against whom I. and A. Street swore informations. Secondly—why the accused were not arrested and committed or held to bail to stand their trial. Thirdly—why the witnesses were not bound by recognizance to appear and give evidence upon the trial of the accused. And lastly—why the said Wm. Hooper, Esq., should not be fined for non-compliance with the requisitions of the 7 Geo. 4, c. 64, and the 11th and 12th Vic., c. 42, respecting the foregoing matters." There were three other cases in which these omissions to bind over the prosecutor and his witnesses to appear afterwards and give evidence, and also to commit or hold to bail the parties accused; and further, in one case, because they took the statement of the accused upon oath, in which I made similar rules on Mr. Hooper and Mr. O'Neill, who had signed the depositions in two of these cases. Cause

was shewn yesterday against making these rules absolute by Mr Hogsett in an able and temperate address, based upon several affidavits filed on behalf of the magistrates. In respect to the grounds upon which the rules issued for non-compliance with the statute law of the land, which requires all magistrates, who take informations against parties who are to be afterwards brought before another tribunal for trial, to take recognizances from the prosecutor and his witnesses to appear and give evidence at that tribunal. I will read the answer given in Mr. Hooper's affidavit in the cases in which the Streets were prosecutors. He therein states that he did not call upon the witnesses to enter into recognizance because he thought, and still believes, there was no necessity—the witnesses for the prosecution have been in attendance upon this honourable court almost every day of the present term. In the case of the Queen against Frederick Spawn, when perfecting the deposition of John Fleming, he, the said John Fleming, desired deponent not to issue a warrant "for the present," and upon leaving deponent's office he said to deponent that if he intended prosecuting his complaint he would be in Burin on the arrival of the Southern Circuit Court there; that both these parties reside at Lamaline, a distance of about forty miles from Burin, and have become related by marriage since the making of the deposition of the said John Fleming; and deponent has heard since then that the matter has been settled between them, and that for these reasons deponent refrained from pursuing the usual legal course. That in the case of the Queen against Samuel Brenton and others, the principal defendant (if there were others) was arrested and to bail, Patrick O'Neil giving bond for his appearance; that deponent did not call upon the witnesses to enter into bonds for their appearance, as they expressed their willingness to attend when called on, and they have been in attendance on this honourable court during the present term, and available had the Crown taken steps to prosecute Brenton or needed their attendance. That in the case of the Queen against Henry Brown, deponent issued his search warrant for the recovery of the property, as also a warrant for the arrest of Brown—both these warrants were satisfactorily executed, Patrick Power, the complainant, with others, assisting the constable. The property was recovered and restored to the owner, the said Patrick Power, and Henry Brown was arrested and lodged in Burin gaol, from which he subsequently escaped. These persons are related and reside, Brown

in Seal Cove, in John de Bay, twelve miles from Burin; and Power in Oderin, twenty miles from Burin, and accessible only by water. On the restoration of the property to the said Patrick Power, he, said Power, refused to prosecute the said Henry Brown. The property was taken from the premises of Brown and placed on board Power's boat, and this deponent lastly saith that the taking the examination of the said Henry Brown under oath was a mistake of him this deponent." Now, that answer I must pronounce to be, as an excuse, wholly insufficient; for where the law prescribes a plain duty to be performed, there is no room left to the person who is to perform it to exercise any discretion, but he is bound to perform it, unless he can shew that circumstances rendered it impossible for him to accomplish it; and what has come before this court has shewn too forcibly the consequences of acting upon the willingness and disposition of witnesses on one day to give evidence against parties charged with grave offences, because we have seen that when called upon next day to give evidence they are not to be found, and the court is left, as I have found myself here, without the instant remedy of estreating their recognizances. But ordinary experience should teach us that witnesses who are to-day ready to do their duty and give their evidence, when, in consequence of that evidence, parties from lawless districts may be convicted of grave crimes, are induced or compelled to abandon their duty under the influence of threats, intimidation and violence. As to the excuse offered in the cases in which Spawn and Brown are the parties accused, that the prosecutors, after preferring their charges, did not desire to proceed, it is far from an excuse, in my judgment, and a proceeding I cannot too strongly discountenance and condemn; for, in a complaint of a trivial character it enables the prosecutor to use a proceeding in a court of criminal jurisdiction to enforce compensation for a wrong done or supposed to be done to him; but far worse than that in a case like Brown's, which was a charge for larceny of seven barrels of flour, and the prosecutor, when he received the flour, refuses to prosecute, the magistrates, who have not taken the legitimate and legal means to compel him to do so, are involved in the charge of participation of his offence in compounding. These irregularities or rather omissions of duty as prescribed by the law of the land were not justified, and most properly, by Mr. Hogsett; nor was the swearing of Brown to his examination, as a party charged with felony; and a document which might

but for that have been a most important one in carrying out the administration of justice, was thereby rendered mere waste paper. But they were excused and palliated on the ground of long usage never before observed upon or censured ; and I shall not now make any rule in reference to these matters, in the confident hope and conviction that a new course will be hereafter adopted, and that such irregularities shall not be hereafter committed. I will now return to the Streets, and to the all-important question raised in their case and the case of Drake and others, and in several other cases, which is simply this, that process of our courts, civil and criminal, cannot be executed in certain parts of this district, and that mob law has acquired such an ascendancy that the ministers of justice, when engaged in the performance of their duties, have to retreat from the exhibition of physical force, and the threats and intimidation uttered and employed towards them.

To sustain this position Mr. Hooper states in his affidavit, that in the case of the Queen against Kerby, Laurence Shock, and others, after having perfected the depositions of Isaac Street and Matthew Thistle, he was informed by the said Isaac Street, the civil force at the disposal of him, this deponent, was not sufficient to enable him to arrest the parties charged by him, the said Isaac Street and the said Matthew Thistle, that it would require a strong civil or naval force to do so ; that from the numbers present at the assault and destruction of property, deposed to by the said Isaac Street and Matthew Thistle deponent's judgment agreed with the assertion of the said Street, as to the difficulty of executing a warrant of apprehension at Lawn ; that in view of these difficulties, deponent did not issue a warrant for the arrest of the accused, but addressed and forwarded a copy of which is hereunto annexed, to Her Majesty's Attorney General, the Honorable H. W. Hoyles, from whom, up to this time, he has received no reply ; that deponent was at all times ready to issue a warrant for the apprehension of the parties charged by Street and Thistle, had a sufficient force been at his command to put the same in execution ; and that in that portion of the southern district over which he has jurisdiction there are but four constables—one at Burin, one at St. Laurence, one at Lamaline, and one at Grand Bank ; and that in the several cases mentioned in the affidavit deponent did what he believed to be for the ends of justice, and if that object has not been obtained, as far as he is concerned, the fault rests not with deponent but in the want of sufficient assistance to carry out the law,"

John O'Neil, Esq., honorary Justice of the Peace, also states in his affidavit "that he believes the course adopted by Mr. Hooper in the case of the Queen against Kirby, Laurence Shock and others, was the exercise of a sound judgment, and warranted by the circumstances and the difficulties which surrounded the case."

Francis Berteau and Owen Pyne, Esquires, Justices of the Peace, also state in their affidavit, "that the ends of justice in many cases occurring in this district cannot be accomplished for the want of a sufficient civil force."

George Butler, of Burin, Sheriff's bailiff, also states in his affidavit, "that he has had frequent opportunities when on duty as such bailiff, and at other times of witnessing the lawlessness of certain inhabitants of the settlement of Lawn, and has heard parties often state that the power of all the men in Burin would not be sufficient or be allowed to arrest or take a man out of Lawn aforesaid, and that if one of their people were taken and lodged in the gaol of Burin, they the said inhabitants, would go in a body and pull down the said gaol and release the prisoner."

John Stephenson, Esq., Sheriff of the southern district, states in his affidavit, "that he believes the difficulties in the execution of civil or other process in the settlement of Lawn and its vicinity are so apparent that the present local civil power, available by the magistrates or other officers of the crown, is totally powerless in the execution of the duties of their office; and this deponent further saith that he, this deponent, has had in his possession certain process, namely, a *capias ad satisfaciendum* against the person of an inhabitant of the said settlement of Lawn, and from the extreme lawlessness of the party therein named, he has been unable to execute the said writ. And this deponent further saith that he has good reason to believe that any attempt to arrest or take into custody any party or parties in that locality would be met with a vigorous and violent resistance on the part of the majority of the inhabitants."

This affidavit relates especially to civil process in the execution of which it may be said the Sheriff might call upon *posse comitatus* to assist him; but it is manifest from these affidavits that, if he did so in the localities referred to, and they did attend, it would be to resist the execution of the writ, and not to aid the officer.

The facts deposed to in these affidavits are strongly corroborated by what has occurred throughout the sittings of this

Court. Three bills of indictment were found against several parties, on the 27th August; when called upon to plead they do not appear or answer, and up to this time not one of them has been arrested or made amenable to justice, although there is no doubt they are to be found at their ordinary occupations and places of abode. Again, a bill of indictment for plundering property, nearly three hundred barrels of flour, from the wrecked ship *Samuel Boddington*, was found against six parties; they appear and plead not guilty, but not one of them is put upon his trial. Mr. Emerson, who conducts prosecutions on behalf of the crown, stating his inability to bring the cases on, as the witnesses would not attend. In one instance a principal witness was in this town and in this court, but when the case was called it was found he had decamped; two constables were sent in pursuit of him, and when they nearly overtook him they saw him taken into a boat and removed from beyond their reach. In another instance the constables were sent to serve *subpœnas* and on their return they made an affidavit, in which they state that two witnesses, on whom they served *subpœnas* in the usual way, said "if they got bait they would not attend, if they did not, they would attend"; they did not attend, and the consequence was that cases ready for trial by the petty jury, who were in attendance, and bills of indictments which were to go before the grand jury could not be proceeded with, and subsequently Mr. Emerson having stated to the Court that he had not the slightest expectation that he could procure the attendance of these or other witnesses during the term of the Court, in some cases, or the parties against whom indictments had been found in other cases, I was not compelled to discharge both the juries from attendance upon the Court. All these circumstances bring conviction to my mind of the truth of the excuse relied upon by Mr. Hooper for not arresting the parties charged with destroying Street's cod seine, that he had not an adequate force to enable him to effect that object; and the only question which remains is, whether he is to be blamed or censured upon that ground, and I must certainly say I think not, after reading the following letter which he had addressed to the Attorney General the day after he took the informations in that case, and to which letter he states that he received no answer:—

BURN, 30th July, 1863.

My Dear Sir,—In enclosing the accompanying copies of depositions made by Street and his servant, I beg to observe that

I have taken no further steps in the matter, as myself and my brother magistrates consider it perfectly useless to send a constable unassisted amongst the lawless inhabitants of Lawn. It is only by a sufficient naval or civil force that any of the parties named in the depositions can be compelled to make their appearance here; and we consider it only a mockery of justice to order the constable to send warrants after them.

I am, sir, your obedient servant,

WILLIAM HOOPER.

The Hon'ble H. W. HOYLES, Attorney General, St. John's.

Under all these circumstances, I feel that I am justified in discharging this rule generally, and I am happy in being relieved from what would otherwise be a painful act of duty in imposing a penalty or casting a stigma or reproach upon Mr. Hooper, who has been for a great number of years in the public service, and has been during that period regarded and respected as a zealous and efficient magistrate. I will merely add that I have granted bench warrants to arrest those against whom indictments have been found, and who did not appear when called upon to answer the charges preferred against them, and attachments against the witnesses who disobeyed the *subpoenas* served upon them; but where is the power to execute these writs? In the places in which the parties to be arrested under these warrants reside, turbulence and insubordination are rampant; law and authority are derided and trampled upon, and the Queen's writs are contemned and depised! To correct such a state of society extraordinary measures must be resorted to, and I do express a confident hope that such measures will be resolutely adopted. In justice to the people of Burin and the neighbourhood around it, I feel bound to state that the places in which lawlessness and turbulence prevail are at considerable distances from Burin, and that the people of this immediate district are characterised by their peaceable and orderly conduct and their respect for the law and the authorities placed over them.

1863, *January*. HON. MR. JUSTICE ROBINSON.

Shipping—Seaman's wages—Attachment—Merchants' Shipping Act—1 Vic., cap. 9, (local).

Under the Local Act 1 Vic., cap. 9, seaman's wages are exempt from attachment. The days mentioned in the Act only refer to penalties.

THE plaintiff was a seaman on board defendant's vessel, which belongs to and is registered in this colony, and, at the time of action, was within this jurisdiction. The suit is brought to recover wages as able seaman.

The defendant pleaded a set off as to part, and, as to the residue, that it was attached in his hands by process out of this court, issued at the suit of a creditor of the plaintiff before this action was commenced.

To this plea the plaintiff replies that the 233rd section of the Merchant Seamen's Act of 17 and 18 Vic. (Imperial Act), and the 10th section of the 1 Vic., cap. 9 (Local Act), exempt the wages of the plaintiff from attachment.

The question for my determination is whether, under either or both of these Acts, the plaintiff's wages are so exempted. The Attorney General submits that the Imperial Act, so far as regards the present question, does not apply to this colony, being expressly limited to "ships registered in any of Her Majesty's dominions abroad, when such ships are not of the jurisdiction of their respective governments." He further argued that the plaintiff had not brought himself under the protection of the Colonial Act by demanding his wages within three days after the cargo was delivered, or ten days after seaman's discharge. To which Mr. Pinsent rejoined that the Imperial Act had, in a recent decision in the Vice-Admiralty Court, in the case of the *Emma* as regards master's wages, been ruled to have application to this colony; and that the Colonial Act had been, in May, 1838, in *Ryan vs. Doyle*, declared applicable to a case like the present.

The Imperial Merchant Seamen's Act contains 548 sections; is, in fact, a volume, and is methodically arranged in ten parts. Some of the parts are expressly declared to have application to the colonies. Some are declared not to have such application; whilst the third part, within which is the 233rd section, is declared to be applicable to a ship registered in a colony "when such ship is out of the colonial jurisdiction."

Our Colonial Act in its preamble recites the corresponding provision in the Imperial Act of that day, and enacts that "*consequently* it is necessary to introduce certain necessary regulations for the government of merchant seamen *in* this colony." However, as it is not necessary for me, in disposing of the present case, to give any opinion as to the applicability or non-applicability of the 233rd section of the Imperial Act to the facts now before me, I advisedly abstain from doing so.

I think the Colonial Act, by a fair and legal construction, exempts the plaintiff's wages from attachment; the days referred to by the Attorney General have relation to penalties the master may incur by not paying wages after demand.

Defendant's plea, therefore, is not supported as regards the balance after the set-off is deducted; and I give judgment for the plaintiff for £3 13s. 6d. currency, being such balance

DOE DEM PRENDERGAST v. BEER, ADMR.

1863, *January*. HON. MR. JUSTICE ROBINSON.

Administrator—Action against—Ejectment—Date of demise in declaration, prior to date of grant of letters of administration—Effect of date on right of entry—Relation back of letters of administration.

The title of an administrator when acquired by letters of administration have relation back to the date of the decease of the intestate, so as to vest in such administrator from the death all the goods and chattels of deceased.

Judgment on rule *nisi* to show cause why plaintiff should not be non-suited upon the ground that the day of demise stated in the declaration was prior to the letters of administration under which the plaintiff acquired title, and consequently prior to the right of entry of plaintiff which he must have to sustain an ejectment.

The verdict in this cause for the plaintiff was consistent with the justice of the case, and the evidence, and I should therefore have set it aside with regret, had I been coerced by law to do so.

Mr. Carter argued the objection he took with much skill, but he has failed to raise in my mind a doubt that the title of the administrators, when acquired by letters of administration, had relation back to the date of the decease of the intestate, so as

to vest in such administrator, from the death, all the goods and chattels of the deceased.

What is the undisputed rule with respect to personal chattels? and I see no reason why the like rule should not apply to real chattels. It was so decided in our Courts in *doe dem McKinley v. Payne*, and I think rightly decided.

The Irish case *Patten v. Patten*, is directly in point, and that case has frequently been recognized in English courts.

In *Sharpe v. Stalwood*, 5, M. & G., the doctrine of relation to the death of the intestate of the letters of administration was fully considered, and therein *Patten v. Patten* was cited.

The only difficulty I felt was that the day of the demise, in the judgment in the case might injudiciously and wrongfully affect the present defendant on an action for mesne profits, but on reflection I doubt whether any such inquiry could arise; the question, however, is settled by the undertaking of the plaintiff to forego all mesne profits for the past. The rule must be discharged.

Mr. Pinsent for plaintiff.

Mr. Carter, Q. C., for defendant.

QUEEN v. DENIS RYAN.

1863, *January*. HON. MR. JUSTICE ROBINSON.

Sheriff—Sheriff's bailiffs, what necessary to constitute valid appointment—Effect on process when executed by bailiff without proper warrant.

An appointment by the Sheriff, under 22nd Vic., cap. 5, sec. 2, of a bailiff to execute a particular process for a particular individual, is not an appointment within the meaning of that Act, and is invalid.

A Sheriff has no authority to constitute a special bailiff to execute a writ until the writ be actually in his custody.

In the decision I am about to give on the exceptions taken by Mr. Hogsett to the validity of the appointment of Wilson Bradshaw, as sheriff's bailiff, and to the validity of the writ in the cause in which Bradshaw was professing to act as such bailiff, for want of a seal, the court is unanimous.

The bailiff's authority is as follows:—

(L.S.) JOHN STEPHENSON, Esq.,
 Sheriff Southern District of Nfld. }

By virtue of the power and authority in me vested as such sheriff, I hereby constitute and appoint you, Mr. Wilson Bradshaw, to be and act as sheriff's bailiff in all matters and things appertaining to the duties of such office wherein James E. Croucher, Esquire, may be plaintiff, and to execute all process, orders and rules issued for him by any commissioner duly authorized to issue such process. Given under my hand and seal, at Ferryland, this 25th day of June, A. D. 1863.

(Signed), JOHN STEPHENSON, Sheriff.

To Mr. WILSON BRADSHAW,
To be Sheriff's bailiff.

The court being of opinion that the objection taken to the bailiff's appointment is valid and must prevail, there is not a necessity for determining the abstract question whether a writ of attachment issued in the Southern Circuit Court should have a seal thereto on its issue in order to give it validity,—had the writ been valid beyond question the insufficiency of the warrants to the bailiff to execute that writ would still be fatal.

It has been contended that the appointment of Bradshaw is valid under the 22nd Vic., cap. 5, sec. 2, which authorizes and commands the sheriffs of the Northern and Southern Circuit Courts respectively, to appoint, in the principal settlements in each electoral district, a deputy or deputies for the service and execution of "all writs, rules, orders and other process of the said Courts respectively"; which deputies shall possess and exercise all the authority of the said sheriff in that behalf, and for whose acts or matters passing through the said sheriff's hands such sheriff shall be responsible; and such sheriffs are required to furnish to the Sheriff of the Central District the names of such deputies, and a list of them shall be exhibited in the offices of the said Sheriff of the Central, Northern and Southern Districts for the information of parties. Now, it would be repugnant to the plain language of that section, and to the intentions of the Legislature on enacting it, to hold that the special appointment of Bradshaw, as above, to execute—not *all* writs—but such writs only as a particular individual

should issue as plaintiff, is an appointment of a sheriff's deputy under that section. And, moreover, it would be unjust to the sheriff to hold that he must be responsible for the acts of Bradshaw as his deputy, when he expressly appoints him as his bailiff, and that, too, for a very special purpose.

It is then contended that at any rate the sheriff has a right to appoint a bailiff, and that he has legally constituted Bradshaw such for the purpose of attaching Ryan's property; but we think that he has not legally appointed Bradshaw in this case, because the writ against Ryan was not then issued, and when, we hold, that a sheriff cannot constitute a special bailiff to execute a writ until that writ be actually in the sheriff's custody. The writ against Ryan did not issue until the 4th Sept., 1863, whilst Bradshaw's appointment is dated 25th June preceding. The sheriff himself could not, on the 25th June, legally levy any attachment on Ryan's property, because he was not authorized to do so by any writ, and he could not delegate to another an authority which he did not himself possess. The appointment, therefore, of Bradshaw to act as bailiff in this case is wholly invalid, and is a nullity.

It is worthy of observation that on the first Monday of July last the sheriff's tenure of office expired. It is true he was re-appointed under a new commission, but the old commission actually expired, and when the authority of the principal ceased the authority of the agent would cease likewise.

THOMAS ET AL v. ST. JOHN'S MARINE INSURANCE CO.

1863, *December*. BY THE COURT.

Insurance—Marine—Terms of policy—Delay—Deviation—Specification of goods in policy "fish and oil"—What it covers—Practice—New trial.

Where in a policy of insurance the words "fish and oil" were written in the margin of the policy, as the specification of the goods insured on board a vessel, it was held that these words narrowed down the effect of the general printed terms of "goods and merchandize" in the body of the policy and confined the insurance to those expressly specified in the margin.

THIS action was brought to recover the sum of £——, being the amount of insurance effected by the defendants for the plaintiffs upon the cargo, from the loading thereof, in a vessel

called the *Brisk*, on a voyage from a port in Placentia Bay to St. John's, and lost in December last, with her cargo, near Lawn, on the western coast of this island. At the time of the loss she was laden with fish and oil—the proceeds of a trading voyage—and the shop goods and other articles which remained unsold after the close of her barter transactions. The policy was in the usual form—on goods, wares and merchandize, which were stated in the valuation clause to be of the value of £600 as per margin, and the description in the margin was "Fish valued at 16s. per quintal; oil, £35 per tun; from a port in Placentia Bay to St. John's."

The cause was tried last term, and the claim was resisted on the grounds that there was unnecessary delay in the sailing of the vessel from Oderin, which, being the port of loading, she left on the 3rd November; whereas, in the representation made to the defendants upon their agreeing to accept the risk, it was stated by the plaintiffs that she was probably expected to be ready to sail about the 25th September; secondly, that she deviated from her course in going into Burin, and afterwards in going back to Oderin after her first departure; and thirdly, that under any circumstances the defendants were only liable for the value of their fish and oil, as specified in the margin of the policy. There was evidence on the part of the plaintiffs to show that there was no unreasonable or unnecessary delay in loading and despatching the vessel, considering the season of the year and the nature of the cargo to be loaded; that the touching and staying for some time at Burin were acts of necessity owing to adverse winds, and that, after leaving Burin, she also met head winds and ran to Oderin as a port of shelter to wait for a favorable time—and was subsequently lost on her passage to St. John's.

After a full and satisfactory investigation of the circumstances, the jury found a verdict for the plaintiffs for the sum of £486—being the value of 520 quintals of fish and two tuns oil, with interest from the date of demand, and also for £108, for the shop goods and other articles of merchandize on board, subject to the opinion of the court on the plaintiff's right to recover for the latter under the terms of the policy.

An application has been made to this court to set the verdict aside and grant a new trial, upon the grounds above stated and urged in the defence, or for a reduction of the verdict to the value of the fish and oil. We are satisfied with the honesty of

the loss; in fact, it was not denied; and the finding of the jury upon this and the other questions of fact submitted for their consideration is sustained by the evidence given in the cause. We are, therefore, of opinion that there is no ground for disturbing the verdict upon the score of delay or deviation. The question of reduction, however, stands on a different footing; it rests upon the legal construction of the policy of insurance; and we feel that, under the authorities, the specification of "fish and oil" in the margin of the policy narrows down the general printed terms of "goods and merchandize" in the body of the document, and confines the insurance to those so expressly specified. It is laid down in *1 Arnold on Jus.*, p. 90, that the policy, being a printed form with the blanks filled up in writing, it is a rule that "if there is any doubt about the sense or meaning of the whole, the words superadded in writing are entitled to have a greater effect attributed to them than the printed words; inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning. Hence it is," says the same authority, "that in the familiar instance of words written in the margin or at the foot of policies, such written words are considered as applying indefinitely to the whole of the policy, and as controlling the printed parts of the policy to which they apply. Thus, where the word *ship* or *freight* or *goods* is written in the margin of the policy, the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are thereby considered as narrowed, in point of construction, to that one."—*4 East*, 140.

Now, we find that the valuation clause in this case expressly refers to the margin; and as the only goods specified on the margin are fish and oil, the general terms of the policy applicable to other subjects besides the particular one mentioned in the margin, are thereby considered as narrowed in point of construction to that one. We are, therefore, of opinion, in this view of this point, that the sum of £108, for other goods and merchandize, stated in the verdict, should be deducted, and that the verdict shall then stand for the sum of £486 and interest, as awarded by the jury.

1863. HON. SIR F. BRADY, C. J.

*Criminal law—Assault on Justice of Peace—Practice—New trial—
Jury improperly pannelled.*

Before a verdict is set aside and a new trial granted, the Court must be satisfied that there are strong probable grounds to suppose that the merits have not been fully and fairly discussed and that the decision is not agreeable to the justice and truth of the case.

IN this case I concur in the opinion expressed by my brother Judge Robinson, that this application ought to be refused and in the grounds upon which he arrived at that conclusion, and which he has stated so fully that I feel it quite unnecessary for me to go over them. The indictment was for a misdemeanor for an assault committed by the defendant upon a justice of the peace; and the jury having found him guilty, the present motion is that that verdict be set aside and a new trial granted. That is a motion addressed to the sound legal discretion of the court, and the rule is "that the court must be satisfied that there are strong probable grounds to suppose that the merits have not been fully and fairly discussed, and that the decision is not agreeable to the justice and truth of the case, before they will grant a new trial."—3, Black. Com., 392; and if such grounds existed they should have been brought under the notice of the court without delay. The court relieved the defendant from the objection on the ground of delay in this case, and not a particle of evidence was submitted to us to shew or suggest that the verdict of guilty was not "agreeable to justice," but the defendant's own affidavit against the evidence of the prosecutor, confirmed, as I conceive that evidence was, by the evidence of the two witnesses whom he called in his defence; the whole of the circumstances leaving upon the minds of the judges the conviction that the verdict of guilty was a correct verdict, and that in any future investigation an honest jury could not come to any other conclusion than that at which the jury arrived who tried this case. *Cui bono* then, for what purpose grant a new trial? My brother, Judge Little, says that, admitting all I have stated, there was a mis-trial by reason of the circumstances under which the panel was formed from which the jury, who tried the defendant, were drawn, and a number of authorities were referred to for the purpose of establishing this position, that where it was plainly shewn that one or more of the jury who tried the case was or were wholly disqualified

the loss ; in fact, it was not denied ; and the finding of the jury upon this and the other questions of fact submitted for their consideration is sustained by the evidence given in the cause. We are, therefore, of opinion that there is no ground for disturbing the verdict upon the score of delay or deviation. The question of reduction, however, stands on a different footing ; it rests upon the legal construction of the policy of insurance ; and we feel that, under the authorities, the specification of "fish and oil" in the margin of the policy narrows down the general printed terms of "goods and merchandize" in the body of the document, and confines the insurance to those so expressly specified. It is laid down in *1 Arnold on Jus.*, p. 90, that the policy, being a printed form with the blanks filled up in writing, it is a rule that "if there is any doubt about the sense or meaning of the whole, the words superadded in writing are entitled to have a greater effect attributed to them than the printed words ; inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning. Hence it is," says the same authority, "that in the familiar instance of words written in the margin or at the foot of policies, such written words are considered as applying indefinitely to the whole of the policy, and as controlling the printed parts of the policy to which they apply. Thus, where the word *ship* or *freight* or *goods* is written in the margin of the policy, the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are thereby considered as narrowed, in point of construction, to that one."—*4 East*, 140.

Now, we find that the valuation clause in this case expressly refers to the margin ; and as the only goods specified on the margin are fish and oil, the general terms of the policy applicable to other subjects besides the particular one mentioned in the margin, are thereby considered as narrowed in point of construction to that one. We are, therefore, of opinion, in this view of this point, that the sum of £108, for other goods and merchandize, stated in the verdict, should be deducted, and that the verdict shall then stand for the sum of £486 and interest, as awarded by the jury.

1863. HON. SIR F. BRADY, C. J.

*Criminal law—Assault on Justice of Peace—Practice—New trial—
Jury improperly pannelled.*

Before a verdict is set aside and a new trial granted, the Court must be satisfied that there are strong probable grounds to suppose that the merits have not been fully and fairly discussed and that the decision is not agreeable to the justice and truth of the case.

IN this case I concur in the opinion expressed by my brother Judge Robinson, that this application ought to be refused and in the grounds upon which he arrived at that conclusion, and which he has stated so fully that I feel it quite unnecessary for me to go over them. The indictment was for a misdemeanor for an assault committed by the defendant upon a justice of the peace; and the jury having found him guilty, the present motion is that that verdict be set aside and a new trial granted. That is a motion addressed to the sound legal discretion of the court, and the rule is "that the court must be satisfied that there are strong probable grounds to suppose that the merits have not been fully and fairly discussed, and that the decision is not agreeable to the justice and truth of the case, before they will grant a new trial."—3, Black. Com., 392; and if such grounds existed they should have been brought under the notice of the court without delay. The court relieved the defendant from the objection on the ground of delay in this case, and not a particle of evidence was submitted to us to shew or suggest that the verdict of guilty was not "agreeable to justice," but the defendant's own affidavit against the evidence of the prosecutor, confirmed, as I conceive that evidence was, by the evidence of the two witnesses whom he called in his defence; the whole of the circumstances leaving upon the minds of the judges the conviction that the verdict of guilty was a correct verdict, and that in any future investigation an honest jury could not come to any other conclusion than that at which the jury arrived who tried this case. *Cui bono* then, for what purpose grant a new trial? My brother, Judge Little, says that, admitting all I have stated, there was a mis-trial by reason of the circumstances under which the panel was formed from which the jury, who tried the defendant, were drawn, and a number of authorities were referred to for the purpose of establishing this position, that where it was plainly shewn that one or more of the jury who tried the case was or were wholly disqualified

as a juror, the verdict would be set aside. Thus, that in one instance he was an alien, in another under age, &c., cases in which the law declares parties shall not be jurors, and therefore cases in which some number less than twelve constituted the jury, and for that reason it was held that there was a mistrial because tried by less than twelve jurors.

It is not necessary for me to go through those authorities at present, because they have all been under our anxious consideration for the past week in the case of the *Queen vs. Carew*, and I, on several occasions, endeavoured to show that they had no application to a case like the one now before the court, in which we have not a particle of evidence by affidavit or otherwise that any one of the jurors who tried this case was not in every respect, in point of law, a duly qualified juror. That is, in my opinion, an answer to the authorities to which I have referred, and, in my judgment, an answer to any argument founded upon the constitution of the jury, in a case like the present where the verdict is admitted to be in all respects "agreeable to justice." I will, however, notice the argument that the panel was wholly bad in point of law, and that the jury who tried this case were no more qualified to try it than if they were drawn from a panel selected by the sheriff from persons in the streets. That is quite an erroneous position. Under the 19 Vic., c. 13, the magistrates were to cause lists to be made out of all persons qualified to serve on Grand and Petty juries, respectively, who resided within five miles of St. John's, and return such lists to the sheriff, and the latter was to arrange his panels from these lists. It also provided that the magistrates should, on the last Tuesday in January in every year after the then present year, 1856, revise the said lists and furnish returns "of all persons who shall have ceased to be qualified, and of all others who shall have become qualified to be placed on the respective lists." Thus, the original list remains a permanent list in the sheriff's office subject to amendment annually by the lists which the magistrates are to furnish to the sheriff after their annual revision. If there be no alterations the magistrates would have no lists to furnish, and in that case the lists of the preceding year would continue to be the lists from which the sheriff should arrange his panels. But then the 25 Vic., c. 6, s. 8, is relied on, and that section enacts that "Parties resident more than three miles from the Court House shall *not be required* to serve on juries," and it is contended that as there was no revision held since the passing

of this Act, and no lists made or furnished to the sheriff of those affected by it, that the lists in existence before that Act, and from which the present panels are arranged, were bad, as not being in conformity with the two Acts, and that, for that reason, the panels drawn from them are bad and illegal also. That would be a very grave question if raised formally before trial by challenge to the array, and it is one upon which I have not come to any final conclusion, although I have given great consideration to it recently in the case of the *Queen vs. Carew* ; and I do not conceive it to be at all necessary for the decision of this case, where the real question is whether the defendant has shown to the court that any one of those who tried him was disqualified as a juror under either or both the Acts to which I have referred? The second Act did not affect the qualification of any person on the lists from which the sheriff arranged his panels, but those who resided more than three miles from the Court House, and it has not been shewn that any one of the jurors who tried this case resided beyond that distance. But, independent of that, the Act does not declare that the parties who reside beyond three miles shall be thereby disqualified, but merely that they "shall not be required to serve on juries," and there is not a particle of evidence that any one of such persons was required to attend. Again, if they were summoned to attend, this enactment would justify them in disobeying that summons, or, if they attended it would enable them to challenge themselves on the ground that they were improperly summoned ; but all that does not render them, in case they act, disqualified, or, that if it were shewn that one or more such persons served upon the jury in this case, the trial would be erroneous or a mis-trial because of that circumstance. These parties seem to fall within the category of those Sir W. Blackstone speaks of in closing his observations upon the grounds upon which jurors may be challenged for want of qualification, where he says, "Besides these challenges, which are exceptions against the fitness of jurors, and whereby they may be *excluded* from serving, there are also other causes to be made use of by the jurors themselves, which are matter of exemption, whereby their service is excused and not *excluded*." The italics are the author's, not mine. There is not, therefore, any ground for saying that there was a mis-trial in this case because of the jury who tried it, for there is not any evidence to show that any one of that jury was in any respect whatever *disqualified*. The verdict of the jury, it is admitted, was agree-

able to the justice of the case, and the only one an honest jury could find ; and under all these circumstances I am of opinion that instead of the exercise of a sound discretion it would be a most unwise conclusion to disturb the verdict, and that the motion for that purpose ought to be refused.

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To an action against the indorsee of a promissory note, where the maker had become insolvent, it appeared that no application had been made to the makers of the note when it matured as they were notoriously insolvent, but a notice had been sent to the indorsees, the receipt of which had not been proven. It did appear that one of the indorsees, the defendant, had repeatedly asked the indorser for delay, and asked not to be pressed for payment, but did not expressly promise to pay. Subject to objection, the jury was directed to find for the plaintiff. Subsequently a rule was granted to set this verdict aside, on the following grounds: (1), want of presentment to makers; (2), want of evidence of their default; (3), want of notice of dishonor to indorsee.

Held—(Setting aside the verdict)—The known bankruptcy or insolvency of the maker of a note, or his being in prison, constitutes no reason in law or equity or in bankruptcy for the neglect to give due notice for non-payment.

Held—Where an indorsee of a note is aware of the insolvency of the maker and knows that the note has not been presented to the maker for payment, and that he has not himself had any legal notice of the dishonor of the note, and that he had been discharged from the obligation of paying it by the laches of the holder, nevertheless gives a distinct promise to pay, he thereby waives the objections; but in such a case the declaration, instead of averring a presentment where such was never made, must state the facts relied on as constituting a waiver of the omission to make such presentment. *Newfoundland Savings' Bank v. McPherson*

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Held—The construction of neither party was correct. The plaintiff was entitled to recover the average "rise" given by all the five firms, together with any advances they may have paid their planters. In arriving at this conclusion the five firms have to be read copulatively not disjunctively. *Munn v. Kearns*

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Erection of rear wall of house, by perch—Deduction from contract price for openings of doors and windows—Usage of trade.

Where in an action for the price of a certain number of perches of stone, which represented the complement which would have been required to complete the rear wall of a house, the Court left it to the jury to say whether there was a usage of trade which justified the contractor in charging for the full entire contents of the wall as if there had been no openings, on the grounds assigned, that the material and labor was greater and more expensive surrounding the openings. *Kelly v. Harvey and Fox* 537

Fishery agreement to purchase produce of voyage at "customary price"—Rule to ascertain meaning of "customary price."

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Nudum pactum—Marine Insurance Policy—Agreement to pay premium although vessel be lost at the date of effecting the policy.

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Vendor and purchaser—Sale by sample—Entire contract—Acceptance by servant.

Where the defendant purchased a quantity of casks by sample, and the plaintiff, under the contract, delivered the casks to the defendant's storekeeper, who accepted the same, but was not aware of the nature of the contract,

Held—The receipt of the casks by the storekeeper was no acceptance. Even a knowledge by the defendant of his storekeeper having received the casks without an opportunity on his part to examine them, would not amount to an acceptance.
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Arson—Power of Court to send back jury to reconsider their verdict when they have agreed.

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Assault on Justice of Peace—Practice—New trial—Jury improperly pannelled.

Before a verdict is set aside and a new trial granted, the Court must be satisfied that there are strong probable grounds to suppose that the merits have not been fully and fairly discussed, and that the decision is not agreeable to the truth and justice of the case. *Queen v. Mooney* 757

Attempt shooting—Insanity—Inquisition as to prisoner's condition for trial.

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Practice—Bail—Power of judge in chambers to review decision of another judge sitting in chambers. (In Chambers).

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Where on an application to a judge in chambers to admit to bail several prisoners in custody on a charge of felony the application was refused, the prisoners renewed their application before another judge in chambers.

Held—The judge was not authorized to entertain the application. Queen v. Gorman et al 581

Practice—Bail—Felony—Discretion of judge of Supreme Court to admit to bail. (In chambers).

A prisoner is not of right entitled to bail when committed on an express charge of felony, and the judge will not admit to bail in cases of felony unless there is a strong presumption of the party's innocence.

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An accused party is not detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him, so as to make it proper he should be tried, and because his detention is necessary to secure his appearance at the trial.

Where on an application for bail by several prisoners in custody on a charge of felony, it appeared that against one, a boy of fifteen, the evidence connecting him with the commission of the offence was slight, and that from his age it might fairly be presumed he acted without premeditation, the judge admitted him to bail. *Queen v. Gorman et al*

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Discharge of prisoners for want of trial—Under General Goal Delivery—Under 14 Geo. III.—Under Habeas Corpus Act, sec. 7—Under discretionary power of Court—Constitution of Court necessary to discharge prisoners—Bail.

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To avail of the relief afforded by the 7th section of the Habeas Corpus Act, a petition must be presented the first day of the first week of the term of court; the fiction of law that "the whole term is one day," is not applicable to an enactment which prescribes something to be done on the first day of the term. *Queen v. Dawson et al*

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Practice—Prisoner held under warrant of coroner for wilful murder—Bills for wilful murder and manslaughter ignored by grand jury—Application for discharge for want of prosecution—General goal delivery—Bail.

The prisoner stood committed under a warrant of the coroner for wilful murder. Bills of indictment for wilful murder and manslaughter had been sent to the grand jury, but ignored by that body. The term of Court having passed without the prisoner being tried, an application was made on his behalf for his discharge under the general proclamation, or for bail.

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Practice—New trial—Absence of qualification of juror—Misdirection—Verdict contrary to evidence—Power of Supreme Court to order a “venire de novo.”

The Supreme Court of Newfoundland possesses all the powers of the Court of Queen's Bench in England, and can therefore legally order a new trial in a criminal case.

Where the defendants were convicted of manslaughter a motion was made on their behalf for a *venire de novo* on the grounds that there had been a mis-trial: (1), because three of the jurors who tried the case did not possess the qualification prescribed by law; (2), mis-direction; (3), verdict contrary to evidence.

Held—Discharging the rule (Robinson, J., differing), exception to the want of qualification of a juror taken after a verdict is not sufficient to warrant the Court in ordering a *venire de novo* the objection would have been a good cause of challenge.

The proper time for a party to make his objections to a judge's charge is at its conclusion, so that the judge may have an opportunity of correcting himself, otherwise such objections cannot otherwise be relied on. *Queen v. St. John et al* . . . 59H

Manslaughter—Sentence—Term of imprisonment.

Where the prisoner was convicted of manslaughter in killing a fellow school boy through throwing a stone, the Court under its discretionary power, and viewing the recommendation of the jury—the character given by his teacher, and the strong testimonial from his school-fellows, reduced the sentence to one month's imprisonment. *Queen v. Foote* . . . 59

CURRENCY ACTS OF NEWFOUNDLAND—

18 and 19 Vic., cap. 8, interpretation of—British sterling—Sterling—Currency.

The word “sterling” in 18 and 19 Vic., cap. 8, is not to be construed as importing British sterling, or sterling money of Great Britain, or lawful money of Great Britain. When the word “sterling” is used alone and without such additions as “British sterling,” or “sterling money of Great Britain,” or words of the like import, it denotes an inferior and depreciated value in Newfoundland, or, in other words, what has been called local or Newfoundland sterling.

There are three standards of value governing local pecuniary contracts and monetary obligations in Newfoundland; first—

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an obligation in currency, which is discharged by payment in dollars, at five shillings currency each ; secondly—an obligation to pay, say £100 British sterling or sterling money of Great Britain, which is discharged by payment in dollars at 4s. 2d. each, or £120 currency ; and thirdly—an obligation to pay £100 "sterling," which has hitherto for some thirty years been discharged by payment in dollars, at 4s. 4d. each, or £115 7s. 8d. currency. *Robinson v. The Queen*

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18 and 19 Vic., cap. 8, interpretation of—British sterling—Sterling—Currency.

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There are three standards of value governing local pecuniary contracts and monetary obligations in Newfoundland ; first—an obligation in currency, which is discharged by payment in dollars, at five shillings currency each ; secondly, an obligation to pay, say £100 British sterling or sterling money of Great Britain, which is discharged by payment in dollars at 4s. 2d. each, or £120 currency ; and thirdly—an obligation to pay £100 "sterling," which has hitherto for some thirty years been discharged by payment in dollars, at 4s. 4d. each, or £115 7s. 8d. currency. *Robinson v. The Queen*

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In an action by the master of a ship against the collector of customs to recover the freight on goods carried in his vessel for an importer, which goods were seized by the collector after entry, on the ground of their being entered under value, it was contended the goods were taken subject to the master's lien for freight, and that the collector was bound to pay him the amount due him for the freight of the goods.

Held—There was no such liability in the defendant for freight. When the Customs seize goods under the Act there is no liability to the captain of the vessel for payment of freight, they take goods without any liability attaching to them. *Brien v. Kent*

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DEED OF GIFT—

Real estate—"Estate tail general"—*Operation of Real Chattels Act—Will.*

In the year A. D. 1796, Joseph Butler, by a deed of gift conveyed to his daughter, Mary Evans, a certain plantation or piece of property to hold unto her and the heirs of her body lawfully begotten. In the year A. D. 1810, Robert Evans, husband of Mary Evans, died, leaving one son and two daughters. In the year A. D. 1815, Mary Evans again married one Doyle, who died in the year A. D. 1851, by whom she had four children. Mary Doyle held possession of the property during her life, and in her own right, her husband never having reduced it into his possession or intermeddled therewith. In the year A. D. 1858, Mary Doyle died, leaving a will bearing date A. D. 1851, by which she bequeathed the said property nearly equally between the children of both husbands. Probate was granted to James Doyle, the executor named in the will. John Evans claimed the whole of the said property on the grounds that it was entailed upon him by his grandfather under the deed of gift of 1796, about ten years before he was born. The executor resisted the claim on the grounds that the property was only a chattel real and not being the subject of an entail vested absolutely in Mary Evans and passed to her executor for distribution under her will. On a special case stated for the opinion of the Court,

Held—(Little J., differing)—The estate vested in Mary Evans, under the deed of 1796, was an "estate tail general," that is, an estate descendible through her to the issue of her body. That as she lived until the year A. D. 1858, the Real Chattels Act (1834) operated on the freehold estate then vested in her so as to render it subject to the law which governs the distribution of chattels real, and it would descend to her next-of-kin instead of the heir of her body. John Evans, therefore, lost all right to the estate which he would unquestionably have had but for the operation of the Real Chattels Act. *Doe. dem. Evans v. Doyle, Executor*

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Libel—Evidence—Admission of articles published subsequent to libel to establish malice.

In an action for libel the Court permitted articles, published subsequent to the libel to be read to the jury as evidence of the malicious character of the defamatory words. *Tobin v. Shea*

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Libel—Jurisdiction of Colonial Court to try foreign Consul for—Protest—Proper mode of objection to trial.

Where the Spanish Consul in his official capacity wrote a letter to the Governor of Newfoundland, containing certain charges reflecting on the character of a Justice of the Peace for Newfoundland, the latter instituted libel proceedings against him. At the hearing the Consul entered a protest against the trial on the grounds that the Court had no jurisdiction to try him for such a cause ; that he could not be prosecuted before the tribunal of the country of his residence, and that the subject matter of the suit was a matter to be decided by the Government of Spain and the law of nations.

Held—The protest could not be received, however available it might be as a ground of non-suit. *W. Grieve v. El Marquis de Caballero*

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Title—How rights to public lands of the Colony are acquired—Practice—New trial—Misdemeanor.

Possession short of twenty years is a sufficient title in ejectment against a party who, without any show of title, comes and takes forcible possession of land. *Doe dem. French v. Dunn*

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ENTICING AWAY SERVANT. *See* MASTER AND SERVANT.

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EVIDENCE—

Admissibility of parol evidence to explain meaning of terms of contract—Policy of insurance—Term in policy “wood cutting voyage.”

Where a policy of insurance contained an exception that the ship was not covered if lost when engaged on a wood cutting voyage, the Court refused to allow parol evidence to be given in explanation of the word “wood.”

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The vessel had been lost on her return from a port where she had gone to cut some spars, and it was contended that the word "wood" in the exceptional clause in the policy meant fire-wood. *Thomas et al v. Marine Insurance Co.* . . . 173

EXECUTOR—

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In an action against co-executors a verdict was obtained by the plaintiff. One of the defendant co-executors paid under a decree of court the amount so recovered. In an action against his co-executor for a contribution of a moiety of the sum so paid, it was contended that the recovery of the amount of the decree having been had upon the ground of negligence, the case was not one in which contribution could be enforced.

Held—That whilst a plaintiff if he recover in an action of tort against two defendants and levy against one, that one cannot recover a moiety against the other for his contribution ; but it is otherwise in an action such as the present, which was in *assumpsit*, a liability for breach of trust as executor, and one in which the right to contribution prevails.

A decretal order may be read at the trial and admitted in evidence on proof of the bill and answer.

When a decree does not reserve the consideration of the points of equity or of the further direction consequent upon the master's report, or the costs of the suit, it is a final decree. *Norman v. Gushue* 29

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FISHERY—

Receiver of voyage—Fishery servant — Wages — Insolvency of employer—21 Vic., cap. 9—Notice of shipping of servant—Practice—New trial.

Where in an action by a fishery servant against the receiver of the voyage, a verdict was given to the plaintiff, the Court afterwards set the same aside on the grounds that the notice required by the statute to be given to the merchant of the shipping of the servant by his dealer had been inadequately proved. *Goff v. Barron.* 286

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Shareman at Seal fishery — Liability of owner of vessel for sealer's share of seals.

In an action against the owner of a sealing ship, by a stow-away, who was adopted during the voyage as one of the crew by the acceptance of his work, for the value of his share of seals, it is no defence that the owner has only received the vessel's share of the seals, and that the crew's share has never come into his custody. *Dunn v. McLoughlan.*

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HABEAS CORPUS—

Insufficiency of commitment—Warrant of commitment for re-examination of prisoners—Bail.

Where persons detained without any warrant of commitment on a charge of murder were brought up by a writ of *habeas corpus*, and it appeared by the return to the writ that the cause of detainer was a commitment for re-examination on a charge on oath of murder against the prisoners. The court refused to discharge them out of custody and committed them to gaol, holding that such a return disclosed a legal cause of imprisonment. *Ex parte John Dawson et al.*

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HUSBAND AND WIFE—

Wife carrying on business, and treated as feme sole—Ratification by husband of wife's contracts.

To bind the husband and make him liable for the contracts of his wife express assent is not necessary, his assent may be implied. The question of ratification by the husband is one purely for the jury. *Bacon v. Young*

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said ward from removing the said ward from the jurisdiction of the court.

Held—The court will not suffer its ward to be carried beyond its jurisdiction, so that as regards its education, religious training, or personal safety, it should be out of reach of the court. *In re Harriet Sophia Rutherford, an infant* . . . 589

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INSOLVENCY—

Application for certificate and final discharge—Fraud, what is necessary on the part of insolvent to constitute.

When the ground set up for refusing a certificate of insolvency and final discharge is "contracting debts without a reasonable or probable expectation of paying them," in order to succeed, it is necessary to show that the debts were fraudulently contracted without hope of being able to pay. *In re Insolvency of John Hogsett*. 527

Assignment to two creditors previous to insolvency—How far assignees are trustees for other creditors—Undue preference to creditors.

Where a debtor assigns his stock in trade and effects by an absolute conveyance to two of his creditors, there is no foundation for asking the court to engraft upon a deed, which is in its express terms a grant for the benefit of two individuals, an equity which would compel them to share that benefit amongst all the creditors of their debtor, it being admitted that the assignment was not made with the fraudulent intention of giving undue preference to creditors. *Thomas et al v. Tasker and Bruce* 197

Assignment of assets of firm for benefit of creditors—Right of creditor of one of the partners to claim against joint estate of co-partnership—Acceptance by trustee of deed, and schedule, with indebtedness of creditor of one partner on same, how far bound by.

The members of a co-partnership becoming embarrassed, assigned by deed to a trustee for the benefit of creditors. A schedule of the assets and liabilities of said firm was attached to the deed. Amongst the liabilities was an amount of £800 due by an individual member of the firm to the plaintiff as a marriage settlement under a deed of trust made many years before. The trustee had accepted the trust; had the deed and schedule delivered to him; realised the assets of the estate; paid

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the creditors the dividends due but refused to pay a rateable dividend of the amounts realised to the party entitled under the marriage settlement claim. In a suit claiming to rank as creditors against the joint estate of the co-partnership,

Held—In point of law and strict right, the plaintiff could not have established a claim against the joint estate of the co-partnership until the joint creditors were satisfied; but such defence is not open to a trustee who takes the estate subject to and bound by the express trust to pay all the creditors *pari passu*. *Seaton et al v. Prowse, trustee* 112

19 Vic, cap. 4—*Assignment with a view of defrauding creditors—What is necessary for petitioner to show before he can obtain the benefit of the Insolvency Act.*

In an application for insolvency the law requires the petitioner to make it appear to the satisfaction of the judge that he is insolvent before such judge can give petitioner the benefit of the Act. *In re Insolvency of William Morison*. 522

Costs to which creditors who have attached are entitled.

Creditors who have proceeded by attachment up to the date of the declaration of insolvency, are entitled to be allowed out of the estate their costs, but not the subsequent costs of proving their debts before the master. *In re Insolvency of McDonald and Ryan* 556

Creditors of insolvent residing in England and Newfoundland, rights of, to rank on estate in Newfoundland.

Where the insolvents are the sole members of a co-partnership carrying on business in England and Newfoundland, though trading under different titles, the assets in England and Newfoundland form a common fund for the general body of creditors, subject to such prior and preferable claims as parties may have against the assets in either country. *In re Insolvent Estate of J. & R. Slade* 710

Declaration of Insolvency—Application for certificate and final discharge—How far declaration estops creditors from urging for punishment of insolvents on application for certificate, matters which might have been put forward on original application—19 Victoria, cap. 4.

Creditors are not estopped from urging matters at the hearing of an application by insolvents for their certificate of insolvency and final discharge, which might have been urged on the original application for insolvency. The declaration of insolvency is not conclusive evidence of the absence of fraud prior to the declaration. *In re Insolvency of Bulley, Mitchell & Co.* 401

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English Bankruptcy Law — Application to Newfoundland — Bankrupt residing in Newfoundland declared bankrupt in England—Payment in full by bankrupt's agent to creditor in Newfoundland after declaration in England but before notice, effect of -- Vesting of bankrupt's assets.

A bankrupt's place of residence was in Newfoundland, and his only place of business was there also, but, being in England, proceedings were taken there against him by creditors, and he was adjudged bankrupt and his assets vested in the hands of assignees. Subsequent to the vesting order the bankrupt's agent conducting his business in Newfoundland paid certain parties there in full for goods previously sold to the bankrupt.

In an action by the bankrupt's assignees against the parties so paid to recover back the several sums, it was contended that the English Bankruptcy laws did not extend to the Colonies.

Held—The English Bankruptcy laws do not extend to the Colonies as a code regulating bankruptcies in the Colonies, but their effect is to vest in the assignee the debtor's personal property which may be there. *Williams et al, assignees of Rutherford v. Peter Rogerson et al*

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English Bankruptcy law — Application to Newfoundland — Bankrupt residing in Newfoundland declared bankrupt in England—Jurisdiction of Bankruptcy Court in England over assets in Newfoundland.

On the 7th of May by petition of creditors an order was made by a judge of the Supreme Court of Newfoundland appointing the Registrar of the Court provisional trustee of the estate of the insolvent, then in England. On an application made on the 18th of the same month, it appeared that the insolvent had been on the 19th of the previous month adjudged bankrupt in England, and his estate vested in trustees there. On an application of the English trustee, a judge of the Supreme Court of Newfoundland ordered the provisional trustee to hand over to the former all of the assets of the bankrupt in this Colony which had come into his hands. On application to the full Court to set this order aside, on the ground that the assignee of the Court of Bankruptcy in England had no legal rights to the assets in Newfoundland, and they should be distributed under the order of the Newfoundland Court.

Held—The order made was correct, and ought not to be disturbed. *In re Insolvency of Robert Rutherford*

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35 Vic., cap. 7, sec. 7—Fraud—Assignment with a view of diminishing assets—Concealing property.

Where on the examination of the petitioner, who had voluntarily come before the court praying that he might be declared

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insolvent, it appeared that when insolvent and with a view of fraudulently diminishing his assets, he had sold a portion of his property and had concealed other portions with the intention of diminishing the sum to be divided amongst his creditors.

Held—The petitioner was guilty of fraud, and had brought himself within the penal provisions of the Insolvency law. *In re Insolvency of James Russell*

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Liability of trustee in insolvency for wages of servant for period in which servant has been kept out of his wages.

There is no liability on a trustee in insolvency for the wages of a servant for any time after his agreement has expired, even though he has been improperly kept out of his wages. *In re Insolvent Estate of John Kavanagh*

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Receiver of voyage—Fishery servants, what proceeds of the voyage contribute to their lien—11 Vic., cap. 14.

Fishery servants under 11 Vic., cap. 14, are in the case of liver of cod, purchased and manufactured, only entitled to claim upon the nett proceeds of the liver after it has been manufactured into oil by them, deducting the prime cost paid for the liver. The principle of the lien established by the Act is to secure to the fishermen their wages out of the proceeds of their labor. *In re Insolvent Estate of J. Kavanagh and Thos. Dollard*

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Receiver of voyage—Fishmaker or curer—Insolvency Act 19th Vic., c. 14—Who is a "receiver" within the meaning of the Act.

Under the provisions of the Insolvency Act 19 Vic., cap. 14, the "fishmaker or curer" is not a receiver of the voyage within the meaning of the Act. *Webby v. Murphy*

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Receiver of voyage—Insolvency Act 19th Vic., cap. 14—Servant of supplier of bait, how far a privileged creditor—Insolvency of master—Meaning of the word "fish."

Under the provisions of the Insolvency Act 19 Victoria, cap. 14, the servant of the bait supplier is not entitled to a preferable security for his wages. The bait master himself is only protected because he is expressly named in the statute. Bait happening to be fish does not therefore come under the general term "fish" as used in the Act. *McGrath v. Kavanagh*

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19 Vic., cap. 14—Wages of fishery servant—How far formal declaration of insolvency of employer is necessary to establish lien of servants for wages.

In order for fishery servants to successfully maintain their lien for wages under 19 Vic., cap. 14, it is not necessary for the employer to be formally declared insolvent. *In re Insolvent Estate of Alexander Boutin*

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Fire—Condition, hazardous communication with property insured, what is—How far policy is an indemnity against negligence.

Policies of insurance were effected on property which was destroyed by fire on June 10th, 1857. The defendant company resisted paying on several grounds, amongst others that the insured had not complied with the condition in his policy to the effect "that the risk shall not be increased by any hazardous communication with the property insured without making the same known to the company, and have it endorsed on their policy." The property was destroyed by a fire caused by the innocent lighting of a candle upon the loft of the barn, which it was contended was a breach of the foregoing condition.

Held—(In charging the jury)—The condition relied on had no application to the present case. It is against such a risk—losses caused by negligence where there is no fraud—that insurance is effected. If the premises be burned down through the negligence of the assured, yet the policy of insurance is an indemnity against that negligence. *Neville and Jack v. Equitable Fire Insurance Company*

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Marine—Constructive total loss—Bottomry bond—Substitution of new for old material, application of rule where vessel is lost before voyage is completed.

The plaintiffs' ship, whilst on a voyage from St. John's, Newfoundland, to Montreal, Canada, sustained damages by going on shore which necessitated considerable repairs. The consignees, having effected the same to the value of £253 11s., took, as security, a bottomry bond. Having proceeded on her homeward voyage she again went on shore and became a total loss. Having been sold at public auction, the amount of the bottomry bond was paid out of the proceeds of the sale to the holder thereof. In an action for the insurance on the ship the jury found a verdict for the plaintiffs. On a rule to set aside the verdict and have a new trial, it was contended by the defendant company,—(a), that the nett proceeds of the sale was theirs and that the amount applied for payment of the bottomry bond ought to be deducted from any amount for which under their policy they were found to be liable; and (b), that they were entitled also to deduct one-third of the cost of repairs (£253 11s. Od.) in conformity with the rule of "substitution of new for old material."

*Held—*The payment of the bottomry bond was a fair and legitimate disbursement from the proceeds of the sale.

*Held—*If, after the repairs to a ship, whether they belong to general or particular average, the ship be lost in the continuation of the voyage, the rule for deducting the one-third does not apply. It is only by reason of the ship coming to the

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owner enhanced by the repairs that the one-third of the value of the repairs is brought to his charge. *Geran and Jackman, Executors of Geran, v. Newfoundland Marine Insurance Co'y* . 141

Marine—Deviation—Terminus ad quem—Terminus a quo—Forfeiture of insurance—Practice—New trial.

Insurance was effected on goods on board the *British Queen* "for one voyage at and from a port at Labrador to St. John's, Nfld., commencing the risk from the loading thereof." The vessel had been fishing along the Labrador during the summer and had returned to Indian Tickle, and from there the owners wrote for insurance. At Indian Tickle they took on board part of their voyage and proceeded to Salt Pond on the Labrador, a distance of 100 miles; there they lay for one month, dried their green fish and caught some herrings. Whilst at Salt Pond the insurance was effected. On the voyage from Salt Pond to St. John's the vessel was lost.

Held—(Brady, C. J., differing)—The insurance contemplated a risk from one port to St. John's, and going to Salt Pond was a deviation and worked a forfeiture of the insurance. *McLea et al v. St. John's Marine Insurance Company* . 539

Marine—Terms of policy—Delay—Deviation—Specification of goods in policy "fish and oil"—What it covers—Practice—New trial.

Where in a policy of insurance the words "fish and oil" were written in the margin of the policy as a specification of the goods insured on board a vessel, it was held that these words narrowed down the effect of the general printed terms of "goods and merchandize" in the body of the policy, and confined the insurance to those expressly specified in the margin. *Thomas et al v. St. John's Marine Insurance Company* . 754

Marine—Seaworthiness.

Where a vessel, three or four hours after leaving port, and not from any extraordinary peril of the sea, was found to be in a leaky condition, and, being abandoned by her crew, immediately sunk, the Court left it to the jury to say whether or not she was in a seaworthy condition at the time of leaving port. *Costello et al v. St. John's Marine Insurance Company* . 127

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Joint right of way to several tenants—Express and implied grant of way.

An express grant of right of way for several tenants for limited purposes and to a limited extent "to the rear of the houses," excludes the presumption of an implied grant of the same way for all purposes, which might otherwise be inferred from the use of the words "all ways appertaining." *Gisborne and Henderson v. Fox et al*

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Parol agreement for a term of twenty-one years—Termination of agreement by tenant at the end of the first year—Verbal notice, sufficiency of—Waiver of parol notice by insufficient written notice.

Under an agreement not reduced into writing for the letting of a farm for twenty-one years, at a rental of £25 per annum, a dispute arose between the parties and the tenant determined on surrendering the farm, and did surrender the same on the termination of the first year, having previous to the said termination given verbal notice to his landlord of his intention so to surrender. In an action for rent for third half year—

Held—Parol notice was sufficient under the circumstances to justify the surrender of the premises. Gleeson v. Quirk

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LAST WILL. *See* WILL.

MAGISTRATE—

Liability for not complying with provisions of 7 & 8 Geo. IV., cap. 24, sec. 1, and 11 & 12 Vic., cap. 42—What is a sufficient justification for magistrate.

Where it appeared that warrants had not issued by the magistrate for the arrest of certain parties, against whom information had been sworn, and further that the accused had not been arrested or held to bail, nor had the witnesses been bound over to appear and give evidence, the Court held it to be a sufficient justification for the magistrate and relieved him from the penalties for non-compliance with the provisions of 7 & 8 Geo. IV., cap. C4, and 11 & 12 Vic., cap. 42, by it appearing to the satisfaction of the Court that there was not at the disposal of the magistrate a sufficient naval or civil force to enable him to enforce the law. *Queen at the Prosecution of Street v. Kirby et al*

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*Desertion—Harboring servants—Notice — Knowledge by party
harboring— Damages—Trespass.*

In an action for enticing away and harboring fishery servants, the proper form of action is trespass on the case, as the damages sought to be recovered are of a consequential character. *Emberley v. Bennett.* 562

*Fishery servant—What class of work servant is bound to do—
What is a reasonable request.*

It is a reasonable request to ask a fishery servant who is shipped "as a hand in a boat, or anything else in his power for the good of the voyage," to go as a hand in a boat with provisions to the scene of a wreck ; his refusal to obey will justify his dismissal. *Lakeman v. Goodridge.* 181

Fishery agreement—Mutuality—Agreement signed only by servant—Enticing away and harboring—Entering into service.

In an action for enticing away a servant from his master's service and harboring him it is no defence that the agreement entered into between the servant and the master was signed only by the former, or that the servant had not actually entered into the service of the master and performed any work. *Fitzgerald et al v. Stapleton.* 170

Fishery servant—Action for wages, defence, desertion—Wages to which servant is entitled where he accepts his clearance.

Where a fishery servant is forced to leave his employment by the harsh treatment of his master, or by his life being endangered by the service, he is not alone justified in leaving the service, but is entitled to the whole of his wages.

A servant seeking and accepting his clearance is only entitled to wages up to the time of leaving his master's service. *Donald v. Candler* 516

Sealing agreement—Shipwrecked sailors picked up at ice and taken on board sealer—Right of sailors to participate in proceeds of voyage.

The plaintiff was one of a sealing crew on board the *Thomas Ridley*. Two of the crew of the *Prima Donna* went astray from their vessel at the ice and were picked up by the *Thos. Ridley* and treated as shipwrecked sailors. Shortly after being picked up the *Thomas Ridley* struck the seals, and bringing in a full load, the crew made about £40 each. To this general result the two of the crew of the *Prima Donna* contributed their share. In an action by the plaintiff to recover his proportion of the two shares to which the shipwrecked men had contributed and which had been held by the defendant as the receiver of the seals on the notice of the captain of the *Prima Donna*,

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Held—The plaintiff must recover. If there had been a wilful desertion on the part of the two of the crew of the *Prima Donna* and due notice had been given of the claim by their master, such a claim might not be untenable, on the grounds of damages for breach of contract, but their absence from their vessel was entirely due to accident, and the crew of the *Thos. Ridley* having settled with them their shares so stopped, must be divided equally amongst the whole crew. *Connell v. Rorke.* 394

Wrongful dismissal—*Servant of Telegraph Company, how far bound to secrecy.*

In an action for wrongful dismissal by a servant of a Telegraph Company, who is employed under a written agreement containing no obligation in it for secrecy or preventing disclosure of the company's business, it is no defence to set up that the servant disclosed the contents of a telegraph message which went through the company's offices. *Morison v. Telegraph Co.* 328

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Attaching to gable of adjoining proprietor.

When the defendant makes any substantial use of the plaintiff's wall he is liable for the value of the same. *Eagan v. Brennan* 165

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Proportion of cost to be borne by each party owning wall—St. John's Re-building Act.

In an action for the recovery of half the cost of erecting a party wall, the judge told the jury to return a verdict for half the amount which they considered had been expended in the erection of a wall. *Dearin v. Coyell* 556

PAYMENT INTO COURT. *See PRACTICE.*PAYMENT OUT OF COURT. *See PRACTICE.*PLEADING. *See PRACTICE.*POSTPONEMENT OF TRIAL. *See PRACTICE.*

PRACTICE—

Administration of estate of deceased—Petition of administrator for directions—Jurisdiction of the Court.

When an administrator of an estate finds it in such a condition that the effects are not sufficient to pay and satisfy all the just debts of the intestate, it is not necessary for him to institute proceedings in equity; the law provides him a summary remedy of meeting such a case by petition to the Supreme Court for an order for distribution. *In re Estate of Jas. Barr.* 715

Appeal to Privy Council—Action indirectly involving £500, right to appeal—Terms upon which appeal is granted.

Where the action was against the defendant for his proportion of the insurance, on a vessel insured in a mutual insurance club, the whole insurance being for £900, the Court were of opinion it gave the right of appeal to the Privy Council, as £500 was involved. *Rogerson v. Spracklin* 368

Appeal—Judge interested in suit.

In order to prevent a denial of justice there is nothing to prevent a judge adjudicating in a suit in which he is indirectly interested. *Robinson v. the Queen.* 707

Application for procedendo—Quashing certiorari—22 Vic., cap. 7, sec. 25.

The writ of *certiorari* to hear and determine a cause can only be had in cases in which the Superior Courts can administer the same justice to all parties as the Court below, but where the inferior Court has jurisdiction and the Court above has not a *certiorari* cannot be had.

There is no precedent for a writ of *certiorari* to issue to have a cause removed for hearing *on the merits* in the Superior Courts in a case where the Court below was empowered by statute to

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hear and determine causes in a manner not according to the course of the common law, but out of the course of that law. *Pinsent v. Boyd & McDougall* 727

Arrest—Irregularity of process—Setting aside—Petitioner for insolvency, how far protected from arrest on the grounds of being a suitor.

On an application for an order to discharge from the custody of the sheriff certain parties who had been arrested on a *capias ad respondendum* whilst on their way home from the Court where they had been in attendance on the hearing of their insolvency,

Held—The defendants had the same privilege from arrest whilst in attendance at the Court at the hearing of their insolvency as if an ordinary suitor or witness. *White v. Bulley & al.* 196

Arrest and malicious prosecution—Action for—Charge of felony—Demurrer.

In an action for malicious prosecution for laying a charge of felony before a magistrate and having plaintiff imprisoned, the defendant demurred to the declaration, admitting all its counts to be true.

Held—The demurrer must be overruled. *Roach v. Hickey* . 162

Assumpsit—Tender, what is a sufficient, proof of.

It is sufficient proof of tender to show that defendant had said to plaintiff "balance was ready for him," that he had it in his pocket at the time, and that the defendant refused to take it. *McCormack v. Leary* 152

Attachment—Money paid into Court—Order for payment out before judgment.

The Court will not, even where security is tendered, order the payment out of money paid into Court by a garnishee under an attachment, before final judgment, even when the motion is supported by an affidavit setting out matters of fraud on the part of the defendant. *Devereux v. Wiseman* 155

Attachment—Property attached in custodia legis—Levying under a fi. fa.

Where the property attached, and upon which the sheriff was directed to levy under a fi. fa., was in *custodia legis*, it having been delivered up by the sheriff to the plaintiff, and subsequently attached at the suit of a third party, under which attachment it was held. Upon a rule upon the sheriff to show cause why he should not levy execution under the fi. fa., and why the property attached should not be applied in satisfaction of the judgment.

Held . The rule must be discharged. *Bryden v. Jackson* . 320

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Attachment charging shares in bank—18 Vic., cap. 4—Transfer of shares—Registration—Bye-laws—Power of bank to hold shares against liabilities accruing.

The defendant, being the registered owner of certain shares in the Union Bank of Newfoundland, by order, dated in March, requested the manager to transfer the said shares to the Savings' Bank. This order was presented to the Union Bank in July, but was not complied with for the reasons—(1) that on the day of the deposit of the order the defendant had assigned for the benefit of creditors; (2) that promissory notes of the defendant were held by the Union Bank, and the shares were not transferred in order that if the notes were dishonored the share would be there to respond; (3) that in order to constitute a valid transfer the assent of two directors was necessary under the bye-laws of the bank, as was also the subscription of the bank stock by purchaser and seller. In the following month of August the plaintiff attached the shares in the said bank under final process.

Upon a rule calling upon the Savings' Bank to show cause why the said shares should not be sold,

Held—The bank had no power to hold the shares except for a liability actually due and existing.

Held—The bye-law which required the assent of the directors to an assignment was void in law, but whilst a remedy existed for the Savings' Bank against the Union Bank for not registering, it did not bar the operation of the attachment which prevailed, the shares not having been transferred and still vesting in the defendant when the warrant was laid.

Ainsworth v. Cusack

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Attachment—Warrant laid in hands of third party holding order from defendant—Present interest and disposing power.

Where monies were attached in the hands of a third party by the plaintiff, it was shown that for some time previous to the laying of the warrant the defendant had drawn an order in favor of a creditor of his, and that monies had been obtained on the said order and were in the hands of the third party when the warrant was laid, and was still held by him.

Held—The defendant had never been divested by the operation of the said order of a present interest or disposing power in the money attached in the hands of the third party, and consequently it was properly attached. *Kitchen v. Lynch*

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Bail—Capias ad respondendum—Bail bond form and amount of.

Where a *capias ad respondendum* issued against the plaintiff, the sheriff took a bail bond for the amount of the debt sued for. On a rule directed to the sheriff to bring in the body of

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the defendant (special bail not having been put in) it was contended that the sheriff in taking bail for the amount of the debt, had done all that by law he was required.

Held—(making the rule absolute)—The bail bond taken should be for double the sum endorsed upon the writ. *O'Dwyer v. Kent* 69

Demurrer—Amendment of pleadings, when allowed.

When on a judgment sustaining the demurrer, leave to amend the pleadings was applied for, but opposed on the grounds that two demurrers had already been over-ruled.

Held—That leave to amend was in the discretion of the Court, and was usually granted when the pleadings were *bona fide* and not for delay. *A. Shea, Executor of Samuel Carson, v. Peter Cowan* 588

Demurrer—Award.

Not using the word "award" in an agreement for submission to arbitration, does not alter the legal effect of the agreement or the submission. *Ainsworth v. Cusack* 234

Evidence—Admission of parol evidence to explain agreement where silent as to time.

In an agreement made between the plaintiff and the defendant company to enter into the service of the latter, no time was fixed for the commencement of the service. In an action for wages over and above the amount allowed by the defendant, the Court admitted as evidence the parol admission of the company's agent to show what had been contemplated at the time of making the agreement, as data to ascertain what was a reasonable time. *Whelan v. New York, Newfoundland and London Telegraph Company* 118

Master and servant—Apprenticeship—Articles—Covenant not to contract marriage within term of apprenticeship—Breach—Action for damages—Demurrer covenant void, being in restraint of marriage.

A covenant in an indenture of apprenticeship binding the apprentice not to contract matrimony within the term is a contract in restraint of matrimony, and is therefore void, being contrary to the public policy of the law. *Whiteford v. McNamara* 159

Motion for stay of judgment—Motion to postpone—Want of evidence, when it may be ground to support a motion to postpone.

On an appointment for a rule for stay of judgment on the grounds that certain papers of importance to the defendant were at a distance from the Court, the judge trying the case

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refused the rule, holding that want of evidence should have been the ground for a motion to postpone. *Doe dem Hunt, Admr. Hunt, v. Andrews* 558

New trial—Contract, breach—Setting aside verdict—Excessive damages.

Before assenting to setting aside the verdict of a jury on the grounds of excessive damages, the Court will require to be satisfied that the damages are really excessive and not sustained by evidence.

It must appear from the amount of damages as compared with the facts of the case laid before the jury, that the jury acted under the influence either of undue motives or of some gross error or misconception on the subject. The case must be very gross and the damages enormous for the Court to interpose; and in a case of uncertain damages a new trial will not be granted, because if the Court had to fix damages they might have given less. *Curtis v. Bowring Bros.* 423

New trial—Verdict excessive—Misjoinder of one of defendants.

In general the Court will not grant a new trial, if there is any evidence to warrant the finding of the jury. *Robertson v. Seaton and Walbank* 471

Practice—New trial—Setting aside verdict.

In an action for taking and detaining certain monies to the value of £370 from the plaintiff, the defence pleaded was set-off for certain charges in and upon and concerning the recovery, custody and care of said monies which had been salvaged by third parties from a wrecked ship. The jury found for the plaintiff for £45 currency. On a rule for a new trial the Court refused to disturb the verdict of the jury, notwithstanding that the amount of the verdict was less than the disbursements, which the plaintiff alleged he had paid away on behalf of the defendant. *Maristany y Elias v. Geo. Simms, sr.* 312

New trial—Setting aside verdict—Excessive damages.

Where in an action of assumpsit for £356 11s. 8d., being a claim for salvage services, the jury found a verdict for the plaintiff for £266, the Court set aside the verdict on the grounds of its being excessive, the defendant paying the costs of the previous trial. *George, John and Jas. Simms v. Maristany y Elias.* 289

New trial—Improper rejection of evidence.

In an action on the case for obstructing certain water privileges, evidence of a declaration by the defendant's wife to a party when possessed of the premises in question, was excluded at the trial. On a rule for a new trial,—

Held—The evidence was improperly rejected. New trial granted. *Eagan v. Barron* 232

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New trial—Misdirection—Reduction of amount of verdict at suggestion of Court.

In an action brought on a policy of insurance, it appeared the vessel insured had run upon a rock and was subsequently beached. The crew, being unable to resist the plundering of those on shore, sold the vessel at public auction. The jury found a verdict as for a total loss. On a rule *nisi* for a new trial, it was contended there had been a misdirection by the trial judge, in that the evidence was clear that the loss was a partial loss only, and the jury should have been told to confine their conclusions to a partial loss only.

The Court, having suggested to the plaintiff's counsel a reduction of the verdict, which was declined, granted a rule for a new trial. *Maier v. St. John's Marine Insurance Company* . 157

New trial, grounds for—Discovery of evidence since trial which would have led to a different result.

A new trial under no circumstances will be granted on account of evidence not having been given at the trial, which was in the power of the party applying to give. *Martin v. Connors* 180

New trial, grounds for—Jury considering issues other than those submitted to them.

Where the jury by considering issues other than those submitted to them, showed their verdict to be one of compromise, and in other respects the verdict being contrary to evidence, a new trial was granted on defendant paying the costs of the first trial. *Chancey v. Law* 153

New trial—Inadmissible evidence—Excessive damages—Inconsistent contracts set up—Rule for jury to follow.

Where in an action by a servant for wrongful dismissal the evidence would not establish to the satisfaction of a jury either the contract for the servant or the master, the correct rule of law is to regard the case as one in which the servant had given his services and the master had accepted them, and the former would be entitled to fair compensation for his services. *Gisbourns v. Newfoundland and London Telegraph Co.* . . . 72

New trial—Verdict contrary to evidence—Excessive damages.

There is no power in the Court to disturb, impeach or question the conclusion the jury arrive at, unless the verdict is plainly one against justice.

It is the exclusive province of the jury to determine on which side the weight of evidence preponderates. *White v. Grieve et al.* 28

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Rule nisi to set aside verdict—Verdict contrary to evidence—Misdirection—Action against sheriff for damage to property attached by him and whilst in his custody.

In an action against a sheriff to recover damages alleged to have been sustained by the plaintiff in consequence of a hawser belonging to him and attached by the sheriff having been injured by rats whilst in the sheriff's custody, the jury found for the plaintiff. On a rule nisi to have the verdict set aside as contrary to evidence,

Held—(Making the rule absolute)—In respect to property in the custody of the sheriff, he is only liable when the injury complained of to the goods attached arises from his culpable neglect or fraud either by himself or his officers. He is not responsible for the destruction of property by rats if he has used ordinary precaution to guard against the damage. McDonald v. Nugent

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Rule nisi—New trial—Trespass—False imprisonment—Commission to enquire into causes of wreck—Powers of commissioners to arrest parties who refuse to attend before them as witnesses.

Where the plaintiff's vessel had been wrecked on the coast of Newfoundland, and the resident magistrate had been charged with misconduct in reference to the same, and a commission consisting of the defendants and others had been appointed by the Governor in Council to enquire into the same, it appeared that on the refusal of the plaintiff to appear before the commissioners, the defendants, both of whom were justices of the peace, had issued their warrant and had the plaintiff arrested and detained for some hours under arrest.

In an action for false imprisonment the jury found for the plaintiff. On a rule nisi to set aside the verdict,

Held—(Discharging the rule)—The commission afforded no justification to the defendants for arrest and imprisonment. The fact of the commissioners who signed the warrant being justices of the peace is no answer, the warrant was signed not as justices of the peace with any criminal prosecution before them, but as commissioners. Marisany y Elias v. O'Brien and Grieve

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Rule nisi — New trial — Misdirection - - Marine Insurance-- Mutual Insurance Club—Construction of rules.

A policy of insurance in the form of the rules of a mutual insurance club, contained, amongst others, two conditions, (1), that before sailing the vessel insured should be surveyed a second time; (2), that the vessel should have four anchors on board at time of sailing. The vessel was lost. In an action brought for the amount of the insurance the jury found for the plaintiff, notwithstanding that the second survey had not been held and it did not appear that four anchors were on board at time of loss. On a rule nisi to set aside the verdict—it was

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contended (a) that rule 10 which required a second survey was a duty imposed on the insured in the nature of a warranty, and (b) that rule 17, which contemplated the presence of four anchors on board was a condition precedent and conclusive on the plaintiff.

Held—The rules in question were merely directory to the committee of the club as to what they were to point their attention to, and not conditions precedent on the insured nor of such a character as to invalidate his insurance. *Rogerson v. Spracklin* 344

Rule nisi to set aside non-suit—Landlord and tenant—Ejectment, party in whom right to maintain.

The party in whom the estate is vested can alone maintain an action of ejectment. *Doe dem. Power v. McBride et al* 37

Practice—Rule nisi to set aside verdict—Improper rejection of evidence—Landlord and tenant—Evidence to vary or alter a written lease—Mistake in description in body of lease.

Evidence will not be admitted at the trial to contradict the terms of a written document, nor are declarations of the lessor made some time after the execution of the lease, and the delivery of possession of the *locus in quo* to the lessee evidence. *Eagan v. Warren* 40

Rule nisi—New trial—Misdirection—Vendor and purchaser—Insolvency—Vesting of property in purchaser—What is required.

On the 27th of October, A. D. 1857, David Steele, of Saint John's, Newfoundland, entered into a verbal contract with P. Rogerson and Son for the purchase of 400 bags of bread, payable by a note at three months, which note was discounted. The bread remained in the store of Rogerson & Son who on several occasions desired Steele to remove it. On Nov. 23rd Steele took delivery of thirty bags of the bread. On November 25th Steele sold 350 bags of the bread to one Boden who paid Steele for the same in a three month's note, which note Boden paid. Boden took no steps to become possessed of the bread until December 16th, upon which day Steele suspended payment. Steele's note not having been paid Rogerson, the latter refused delivery of the bread to Boden on Steele's order. In an action brought by Boden against Rogerson for the recovery of the value of 350 bags of bread,

Held—That Boden had no action. In order to vest the property originally in Steele, it should have been separated, set apart and appropriated for Steele's benefit. Nothing of the sort had been done. The property never vested in Steele so as to enable him to sell to Boden.

A sale is not completed and the property is not vested in the vendee until there has been a delivery and acceptance, and such delivery is not completed, so long as anything remains for

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the vendor to do, whereof the quantity, quality, price or identity of the chattel sold is to be ascertained. *Boden v. Rogerson* 266

Rule nisi—New trial—Misdirection—Vendor and purchaser—Insolvency—Vesting of property in purchaser, what is required.

On the 17th of October, A. D. 1857, the plaintiff purchased of one David Steele 6,000 qtls. merchantable fish, at 17s. 9d. per qtl., by notes at three months amounting to £5,300, which notes were given for the whole amount at the time. The plaintiff received from time to time 4,792 qtls., leaving 1,208 qtls. to be delivered, when it was found that Steele had appropriated to his own use a portion of the fish sold, and had not sufficient merchantable fish remaining to complete delivery. It was finally decided to take other qualities at reduced prices to make up deficiencies. Steele wrote an order to his store-keeper to deliver to plaintiff a bulk of large Madeira and the balance in Labrador, without specifying any particular quantity.—Under this order the Madeira was delivered on Dec. 17th; on this date there were two bulks of Labrador fish in Steele's store, and these bulks were pointed out by plaintiff's broker as the ones from which he would take the quantity required; and out of one bulk 70 qtls. were taken when the store closed for the night, their culler being present to cull it. Next morning the defendants, as trustees under a deed of assignment executed the preceding evening, were in possession, and refused to allow plaintiffs to take any more fish. It also appeared that when taking stock, with a view of making the assignment, that Steele instructed his clerk to reserve the quantity due plaintiff; no such reservation was made in assignment. Plaintiffs brought action for the value of fish undelivered. At the suggestion of the court a verdict was entered for the plaintiffs. On a rule to have the verdict set aside and a verdict entered for the defendant,—

Held—(making the rule absolute)—In order to vest the property in the plaintiffs it should have been separated, set aside and appropriated for the plaintiffs' benefit. Nothing of the sort had been done. The property never vested in the plaintiffs.

A sale is not completed, and the property is not vested in the vendee, until there has been a delivery and acceptance, and such delivery is not completed so long as anything remains for the vendor to do, whereof the quality, quantity, price or identity of the chattel sold is to be ascertained. *Ridley et al v. Grieve and Ehlers*

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Rule nisi—New trial—Misdirection—Marine insurance—Mutual Insurance Club—Construction of rules—Waiver.

The articles of a mutual insurance association contained, amongst other rules:—(a) "That in addition to the survey upon which a vessel may be accepted for admission in the asso-

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ciation, said vessel, when within reach of the surveyors of the association, is to undergo a survey"; (b) "The duty of the surveyors, when requested by a note from the secretary, is to see that the vessel proposed for admission has, amongst other things, a third heavy anchor on all but a sealing voyage," &c., &c., &c.

In February, 1859, the plaintiff's vessel, *True Blue*, was admitted into the association and received a certificate, under which she sailed and was lost in the month of November.—She had been at St. John's, "within reach of the surveyors," for a fortnight, but her owners did not give notice thereof to the association.

In an action brought to recover against one of the association his proportion of the insurance, the jury found for the plaintiff. On a rule *nisi* to set aside verdict it was contended, (1) That the want of notice of the arrival of the *True Blue* "within reach of the surveyors," which the owners were bound to do, was a warranty or condition precedent to their recovery; (2) That she had not on board three heavy anchors at the time of the loss, which was also a warranty under the 31st rule.

Held—(Brady, C. J., differing, discharging the rule)—The words of neither rule constitute a warranty. The rules were merely directory to the committee of the club as to what they were to point their attention, and not conditions precedent on the assured, nor of such a character as to invalidate his insurance. *Muir et al v. McBride et al*

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Non-suit—Power of Court to compel non-suit—Rule nisi to set aside non-suit.

In an action of trover the defendant moved at the close of the defendant's case for a non-suit on several grounds. The plaintiff refused to be non-suited, contending that on his own election only could he be non-suited. The Court non-suited him. On a rule *nisi* to set aside non-suit and for a new trial,

Held—That as there was no court of error from which a bill of exceptions lay from the Supreme Court, that its constitution was therefore such as to give it the power of peremptory non-suit. *Crangle v. Clift*

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Pleadings—Defence—Set-off—Mutual debts—Demurrer.

In an action brought by the plaintiffs against the defendant as indorsee of a promissory note drawn by Bulley, Mitchell and Co., and indorsed to the bank, the defence set up was that the makers of the note had by deed assigned sufficient property to the bank to pay their indebtedness to the bank, and afterwards in trust to pay their other creditors; that the said note sued on was covered by the said trust, and the defendant claimed to set-off the said amount due them under the said trust

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against the amount sued for. This plea was demurred to, and the cause of special demurrer assigned was that the said debts were not mutual.

Held—The defendant had no claim in law or in equity against the bank; to constitute such a set-off as claimed he must have paid his endorsement, which he had not. The promise alleged in the plea was a mere *nudum pactum*, upon which no action could be maintained, and consequently did not establish any right to the set-off pleaded. *Nfld. Savings Bank v. McPherson*. 459

Pleadings—Plea of, release of Insurance Company holding joint risk—Demurrer—Plea bad in not averring release to have been by deed.

In an action brought upon a policy of insurance, the defendants pleaded a release of another insurance company, carrying a joint risk, for a similar amount and of a policy in force at the time of the loss, and paid into Court half of the amount of the policy insured by them. This plea was demurred to on the ground that it was a bad plea of release, and ought to have been averred to have been by deed.

Held—The plea was bad for not averring the release was under seal. *Munn v. Nfld. Marine Assurance Company*. 107

Pleading—Demurrer—Assault and battery—Defence; Judicial acts—How far plea must show a sufficient legal justification.

In an action of trespass for assault and battery against two justices of the peace, and a policeman acting under their warrants, when the assault and battery is justified on the grounds of being justices of the peace, it must appear by the plea they had a legal justification and that they were acting as justices, or that there were valid legal proceedings instituted to give them the character they claimed. *Maristany y Elias v. Grieve, O'Brien and Chancey*. 330

Pleading—Trespass—Declaration—Special plea—Demurrer—Original trespass—Substantive trespass—Matters of aggravation only.

The plaintiff carried on the business of a general dealer, and as such was possessed of certain premises. The trespass charged that the plaintiff broke and entered the said premises, and forcibly obtained and carried away the key thereof, and closed up the premises and interrupted, &c., the plaintiff in the enjoyment thereof and evicted him from said premises. The second count charged that the defendant broke, &c., certain other premises and thence ejected, &c., the plaintiff from the possession thereof and from the prosecution of his business, and continued him so ejected for a long space of time, whereby, &c., &c. To this declaration the defendant pleaded (1) the general issue, and

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(2) a special plea that one Bruce was lawfully possessed of certain goods on said premises, and entered with the leave and license of the plaintiff to remove the same, and that defendant by command of the said Bruce entered for the purposes aforesaid. To this plea the defendant demurred on the ground that the plea professed to be an answer to the whole declaration, but only answered part.

Held—Sustaining the demurrer, the first count of the declaration charges a substantive trespass *de bonis asportatis* which ought to have been, and has not been answered, in a plea to the whole of the cause of action in the declaration, and that upon that ground the plea was bad. *Rutherford v. Grieve* . . . 61

Setting aside writs of fi. fa. and ca. sa. for irregularity.

On an application to set aside a writ of *capias ad satisfaciendum*, under which the defendant was in custody, the Court, notwithstanding that the evidence abundantly proved irregularities, made the release conditional by restraining the defendant from bringing any action for the imprisonment. *Bearns v. Perchard* 254

Set-off for professional service—Court of Sessions, authority to tax costs in between attorney and client—Delivery of attorney's bill—Quantum meruit.

There is no authority in any officer in the Court of Sessions to tax costs as between attorney and client; therefore in an action of assumpsit, where as a defence for the amount claimed the attorney set off his taxed bill, it was held irregular, the proper proceeding being to rely upon a *quantum meruit* for his services. *Duffy v. Hogsett* 150

Specific performance—Vendor and purchaser—Assignment of leasehold interest.

The agreement sought to be specifically performed must be accurately stated on the record, and the case proved as stated. A court of equity in the exercise of an enlarged discretion may decree or refuse to decree specific performance of a contract, but it possesses no power to make one, or to add to the terms and conditions of that made. *Bridgman v. Ellis* 325

Witnesses, exclusion from Court during hearing of case—How far rule applies to parties to suit.

Parties to suits are not debarred from being present in Court during the hearing of their suits. *Stone v. Dwyer* 167

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PROMISSORY NOTE—

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Promise to pay in specie—Tender—Gold sovereigns—Silver dollars—Legal tender.

The defendant by his promissory note made at St. John's, Newfoundland, promised to pay to the plaintiff on demand six pounds currency in specie, and on demand made for payment of the said note, tendered to the plaintiff in discharge of the same, five gold sovereigns which the plaintiff refused to accept, claiming to be paid in silver dollars at the rate of five shillings each. It was admitted that sovereigns generally pass current in St. John's at the rate of twenty-four shillings currency each, and that if sovereigns were a legal tender in discharge of the said note, the amount so tendered was a sufficient value.

Upon a special case agreed upon for the opinion of the court,

Held—The tender was not a good legal tender nor a sufficient discharge in law of the sum claimed under the note. Under the law of tender, sterling money cannot be tendered in discharge of demands in currency until their value in respect of one another is fixed and determined by law. *Brooking v. Thomas*

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PUBLIC OFFICERS—

Bond—Crown lien of an estate for such bond—Statute English—How far in force in Newfoundland—38 Hen. 6, cap. 39, and 13 Eliz., cap. 4—Mortgage of real estate, priority of.

The statutes 38 Hen. 3, and 13 Eliz., cap. 4, which gave the Crown a lien upon the real estate of certain public officers as a security for the fulfilment of their bonds are not in force in Newfoundland. *Des Barres v. Morris*

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RECEIVER OF VOYAGE—

Fishery servants—Wages—Insolvency of employer—Usages of fishery—Right of servants on insolvency of employer to follow produce of voyage into the hands of the receiver.

There is no usage or custom of the fishery prevailing in Newfoundland whereby fishery servants have the right to follow the produce of the voyage in the hands of the merchant who received it, so as to compel him to pay them their wages on the insolvency of their employer.

No such custom could exist, wanting as it does the grand essential of custom, viz. : prescription—antiquity beyond the memory of man.—(Chief Justice Norton in *Moreen v. Ridley*).

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Such a right did exist under 15 Geo. III., cap. 31, sec. 16, but that Act was repealed by 13 and 14 Vic., cap. 80. *In re Fishery Servants of Patrick Cashman, Insolvent Debtor* . . . 11

RECONSIDERATION OF VERDICT. *See* CRIMINAL LAW.

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SETTING ASIDE WILL. *See* WILL.

SHAREMAN. *See* FISHERY.

SHERIFF—

Attachment—Attaching a British ship—Interest of mortgagor in ship after he has mortgaged same—Practice—Non-suit.

The British ship *Islay* was, previous to April 13th, 1857, owned by one Lydraid, and on that date mortgaged by him to one Young, of P. E. I. Some time after Young assigned the mortgage to the plaintiffs. In the autumn of 1858 the *Islay* came to St. John's, Newfoundland, where she was attached at the suit of the seamen against the mortgagor for their wages, under which attachment the sheriff seized and kept possession

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of the ship; this was before notice to the sheriff that plaintiffs had any interest in her. Afterwards notice was given to the sheriff by the plaintiffs of their interest, when the latter offered to give up the vessel, which was declined, and the ship, being abandoned, went adrift and was lost. In an action of trover against the sheriff, the jury found for the plaintiffs. On a rule *nisi* to set aside the verdict and enter a non-suit—

Held—(Setting aside the verdict)—The sheriff was not a wrong-doer, and was justified in attaching the ship. The whole of Lydraid's interest did not pass to the mortgagee, and Lydraid's creditors could attach the ship to the extent of that interest. The mortgagee does not become, nor does the mortgagor cease to be, the owner of the vessel. A British ship forms the exception to the rule that the whole legal estate or interest in all property mortgaged vests in the mortgagee.—*Thompson and Abbott v. Nugent, Sheriff*

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Attachment—Escape—False return—Practice—Rule nisi—New trial.

In an action against a sheriff for negligence in suffering property, which had been attached by him on behalf of the plaintiff, to escape, and for a false return in alleging that the property was rescued, the jury found for the plaintiff. On a rule *nisi* to set aside the verdict, it appeared that the property attached had been left at the premises of the father-in-law of the debtor, from which it had been subsequently rescued, and against the advice of the plaintiff's agent, who had urged its removal to the plaintiff's premises near by.

Held—(Little, J., differing)—The rule *nisi* must be discharged. Leaving the boat at the premises of the debtor's father-in-law was palpable negligence, in view of the fact that it was competent for the bailiff to remove her to a place of comparative safety. *Bennett v. Stephenson*

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Charges on property sold under rule of court by sheriff, to which he is entitled.

The sheriff is not in strict law entitled to anything for keeping an officer in charge of a house after the goods are removed. On the sale of goods by the sheriff the Court has authority to authorise the payment of a commission. *In re Insolvent Estate of McDonald*

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Sheriff's bailiffs, what necessary to constitute valid appointment—Effect on process when executed by bailiff without proper warrant.

An appointment by the sheriff under 22nd Vic., cap. 5, of a bailiff to execute a particular process for a particular individual is not an appointment within the meaning of the Act, and is invalid.

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A sheriff has no authority to constitute a special bailiff to execute a writ until the writ be actually in his custody. *Queen v. Denis Ryan* 752

SHIPPING—

Advance on freight, Insurance on same—Failure of ship to complete voyage—Freight, and freight pro rata, Liability of Insurance Company for.

A cargo of fish shipped at St. John's, Newfoundland, was by bill of lading to be landed at a port or ports of Spain, or on the west coast of Italy or Sicily. The plaintiffs advanced to the master in St. John's £300 on account of the freight to be earned. The plaintiffs insured with the defendant their advance by a policy of insurance. On the voyage the ship experienced tempestuous weather, and in consequence became damaged and bore up for Fayal, from where she proceeded after effecting repairs to Liverpool in ballast. The cargo, on the advice of surveyors that it would not be fit to reship by reason of deterioration, was sold at auction at Fayal with the consent of the master, who undertook to act as agent for all the parties interested, but without the knowledge of shippers or consignees. No new contract for freight *pro rata* was made. Upon a special case stated for the opinion of the Court two questions were submitted: 1st, Whether freight *pro rata* ought to be paid the ship? 2nd, What amount, if any, the plaintiffs were entitled to recover from the defendant?

Held—As to the first question, there was no liability for freight *pro rata*. In order to establish such a claim there must be a voluntary acceptance of the cargo at an intermediate port in such a mode as to raise a fair inference that its further carriage was intentionally dispensed with. The right to freight *pro rata itineris* must arise out of some new contract between the master and the merchant, either expressly made by them or to be inferred from their contract.

Held—As to the second question, the underwriters cannot be held liable for any freight. *Thomas et al v. The St. John's Marine Insurance Company* 130

Bills of exchange—Notice of dishonor—Effect of notice of dishonor, when plaintiff sues on the common counts—Practice—Rule nisi—New trial.

The plaintiff sold in Placentia a quantity of fish to defendant, taking in payment an order on a firm in St. John's, where on presentation the same was dishonored, the drawees having no effects. The plaintiff sued on the common counts, treating the bill of exchange as a nullity and relying on the original contract. At the hearing no evidence of notice of dishonor was given. On motion for a rule *nisi* to set aside verdict,

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Held—There was no necessity for notice in such a case, as between the original parties to the bill. *Sparrow v. Brutin* . 172

Bill of exchange—Written acceptance—Application of 2 Geo. IV.

The statute which requires a written acceptance of an inland bill of exchange applies to Newfoundland. *Moore v. Beake* . 231

Bottomry bond—Wages of seamen and master earned prior to and after execution of bond, Priority of.

Seamen's wages, earned before or after the giving of a bottomry bond, are to be preferred to the bond. No distinction has ever been taken between wages earned before and after the giving of a bond, both are alike preferred to the bond.

A master who gives a bottomry bond binding himself, ship and freight for a payment of advance, cannot afterwards claim his wages to the prejudice of the bond. *The "Emma"* . 723

Collision—Contributory negligence—Projection of jib-boom over public waters.

In an action for damages where plaintiff's vessel, whilst moored to his wharf, was run into and injured by the defendant's vessel, the judge trying the case told the jury it was no defence that the jib-boom of plaintiff's vessel projected over the public waters of the harbor. *March v. Bartlett* . 421

Freight—Usage of trade to carry goods free, where freight was paid on return cargo.

Where the plaintiff claimed freight on goods from St. John's to Twillingate, from which port he was to bring back a cargo of fish at one shilling per quintal, the defence set up was the usage and custom of the trade to carry such goods free; the court left it to the jury to say whether there was a custom or usage as would exempt the defendant from payment of freight. *Keating v. McBride et al.* . 164

General average—Vessel driven on shore—Re-shipping cargo—Expenses—Contribution.

A vessel on a voyage from St. John's to Montreal was abandoned by her crew, and subsequently boarded again and towed into port and secured. It became necessary to discharge her cargo in order to repair her, which led to her being frozen up for the winter. The cargo, in the meantime, there being no stores, was covered up on the beach with the vessel's sails. On the opening of spring cargo was re-shipped and brought to its destination. The defendant, being part owner of the cargo, declined to pay any contribution towards general average, as the ship was driven on shore, and the loss which occasioned

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the expenditure on ship and cargo arose from the ordinary perils of the sea, and not through the agency of man.

Held—That where a ship is obliged to go into port for the benefit of the whole concern, the charges of unloading and re-loading the cargo and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average. *Ainsworth v. Cusack* 236

Merchant Shipping Act—Registration—Trusts.

The provisions of the Merchant Shipping Act do not take away the power of the Court to notice trusts, and in this respect only applies to registry. *Reddin v. Cameron, James, Roberts and Palmer* 504

Salvage—Principle on which salvage was awarded.

The amount of remuneration of salvage services must depend on all the circumstances of the case. The state of the weather, the degree of damage and danger to the ship and cargo, the risk and peril incurred by the salvors, the time employed and the value of the property saved. When all these concur a large and liberal award ought to be given; when scarcely any of these ingredients appear the compensation ought to be little more than remuneration for work and labor. *The Wm. Tucker* 99

Salvage—Salvors, two sets—Bona fide salvors—Original salvors, rights of—Second set of salvors taking property from original salvors—Practice—New trial.

Where a second set of salvors take property from original salvors, to justify the taking, they must establish an absolute necessity for the interference existing at the time they took the property.

The right to the property exists in the original salvors unless it appears that further assistance was necessary for the preservation of the same.

The *onus probandi* lies on the salvors who came to assist those in possession to show an adoption of their services or an incompetency in the first occupant to effect the salvage. *Forsey v. Duchesne* 65

Salvage—Costs, Marshal's fees.

Where, on taxation of the marshal's fees in Admiralty, the Registrar allowed him a commission of three per cent. upon the sale of the vessel and property, the Court reduced the amount to two and one-half per cent., and further held that there was nothing to prevent parties in future from moving that the sale be executed by any other person, if conducive to the interests of all parties. *The Envoy* 556

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Seaman's wages — Attachment — Merchants' Shipping Act — 1 Vic., cap. 9 (local.)

Under the local Act 1 Vic., cap. 9, seamen's wages are exempt from attachment. The days mentioned in the Act only refer to penalties. *Hynes v. Feehan* 750

SHOOTING—ATTEMPT AT. *See* CRIMINAL LAW.

SOVEREIGN. *See* PROMISSORY NOTE.

SPECIE. *See* PROMISSORY NOTE.

SPECIFIC PERFORMANCE. *See* PRACTICE.

STATUTE OF FRAUDS. *See* CONTRACT.

STAY OF JUDGMENT. *See* PRACTICE.

STERLING. *See* CURRENCY ACTS.

SUBMISSION TO ARBITRATION. *See* ARBITRATION.

SUPPLIER OF BAIT. *See* INSOLVENCY.

TELEGRAPH COMPANY—HOW FAR BOUND TO
SECRECY. *See* MASTER AND SERVANT.

TENDER. *See* PRACTICE.

TESTAMENTARY CAPACITY. *See* WILL.

TONNAGE. *See* VENDOR AND PURCHASER.

TRANSFER OF SHARES. *See* PRACTICE.

TRESPASS—

Assault and battery—Removal of clerk of St. Thomas's church, St. John's, from clerk's pew—Right to appoint and dismiss clerk of St. Thomas's church—Practice—Rule nisi—Setting aside verdict—Misdirection.

On the 19th of January, 1838, the Reverend Archdeacon Wix appointed the plaintiff, Henry Earle, to be the first clerk of St. Thomas's church, St. John's. In 1839 Bishop Spencer by an instrument under his seal confirmed the said appointment, and the plaintiff continued to hold the appointment for twenty-one years. In 1853 the Reverend Mr. Wood was appointed minister of St. Thomas's church, under an instrument from Bishop Feild, not over the parish, but over the congregation; subject however to the rights of the Cathedral and the mother church. In 1859 Mr. Wood dismissed the plaintiff from his office of clerk. Bishop Feild denied the authority of Mr. Wood to make any such dismissal. The churchwardens upheld the decision of Mr. Wood, and on Sunday, November 6th, 1859, in the presence of the congregation assembled for

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Divine Worship, the plaintiff was forcibly removed from his pew whilst officiating in his robes as clerk. In an action for assault and battery the defendants justified the assault on the grounds that the plaintiff was not their clerk, and had no right to be in the clerk's seat, and relied in support of their justification upon the validity of Mr. Wood's dismissal. The jury found for the plaintiff. On a motion to set aside the verdict for misdirection and improper rejection of evidence,—

Held (discharging the rule)—The Rev. Mr. Wood had not in point of law power to dismiss the plaintiff. The right of dismissal is contingent on the right of appointment, and in this case vested in the Bishop of the Diocese. The position which Mr. Wood occupied in the church of St. Thomas, pursuant to his license and his own admission, was that of curate, which would not in England and did not in Newfoundland invest him with any authority to dismiss or appoint the clerk, and his dismissal of the plaintiff was nugatory. *Earle v. Simms et al*

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TROVER—

Seals panned on the icefields—Reducing into possession—Abandonment.

If a party leave seals scattered about on the icefields without any reasonable hope of recovering them, and they are taken by another party, the original owner has no remedy against the party so taking the seals. *Noel v. Warren*

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Seal pelts—Reducing into possession—Practice—Rule nisi—Verdict contrary to evidence—New trial.

Where the evidence showed that the plaintiff had killed a certain quantity of seals and that the same had been taken, and that defendant's vessel was the only one in the neighborhood to take the same, and the jury found for the plaintiff; the Court refused to grant a rule to set aside the verdict. *White v. McBride*

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Seals panned on the icefields—Reducing into possession—Abandonment—Recovery.

In an action of trover to recover the value of seal pelts alleged to have been taken by the defendants, the judge trying the case held that if from the looseness of the ice, the wheeling of the same, the condition of the weather, the chances of recovery of the seals by the plaintiffs was so slender as to amount to a hopeless pursuit, that then they had ceased to have any property in the same. *Power et al v. Jackman et al*

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TRUSTS. See SHIPPING.

TRUSTEE—LIABILITY OF. See INSOLVENCY.

TRUST DEED—

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Absence of words of limitation—Power of sale in representative of deceased trustee—Extinguishment of power of sale by death of trustee.

There is no power transmissible to the representative of the donee of the power either to his heir, executor, administrator or assign, where such representative was not mentioned in the words creating the power. Where the trust deed designates or marks out no person other than the trustee as a donee of the power it cannot go to his heir, executor, administrator or assign, but with his death it becomes extinct.

The grounds upon which powers of sale are given is personal confidence in the donee of the power, and the intention that such powers will extend to persons other than those named as the donees of the power will not be presumed. *Bearns v. Noad et al*

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UNDUE INFLUENCE. *See* WILL.

USAGE OF FISHERY. *See* RECEIVER OF VOYAGE.

USAGE OF TRADE. *See* CONTRACT.

VENDOR AND PURCHASER—

Deed of sale of land—Covenant of good title—Breach—Verbal evidence to vary deed—Character of plaintiff, necessity of proof of—Eviction, necessity of proof of.

In an action for breach of covenant of good title it was proven that the vendor was not the owner and had not the title in all of the land conveyed by his deed. The defence, amongst other grounds set up, was that notwithstanding the measurements in the deed did not correspond with the actual measurements of the land, that the variance was cured by the parties having, previous to the execution of the deed, agreed on a less quantity of land than that set out in the deed. At the trial the Court refused to admit evidence to vary terms of deed. The jury found for the plaintiff. On a rule for a new trial on the grounds: (1) Improper rejection of evidence; (2) No proof of death of party for whom plaintiff was administrator; (3) No proof of eviction;

Held—(Discharging the rule)—Where a contract has been reduced into writing, verbal evidence will not be admitted (except to establish fraud) of what passed between the parties to the contract either before the written instrument was made or during the time it was in a state of preparation, so as to add to, subtract from, or in any manner vary or qualify.

Held—When there is no denial in the pleadings of the character in which the plaintiff sues it is admitted.

Held—In an action for breach of covenant for good title, eviction need not be proven; the averment is mere surplusage. *Prosser, Administrator of Pearse, v. Wingfield*

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VENDOR AND PURCHASER—continued.

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Warranty, breach of—Deceit—Sale of ship—Tonnage—Practices—Rule nisi to set aside verdict—Verdict contrary to evidence.

The defendants, by public advertisement, offered for sale their ship *Lena*, burden per register 159 tons. The plaintiff purchased the same by bill of sale, which set forth she was of the burden of 159 tons. After the sale had taken place the ship was officially measured for a new register, when it was found she was only of the burden of 147 tons. In an action for a breach of warranty, deceit and misrepresentation, the jury found for the defendants. On a rule nisi to set aside the verdict as contrary to evidence,

Held—The rule must be discharged. Even if the jury believed the tonnage was less than that stated in the register, they were warranted in finding for the defendants, in that the latter made no absolute representation as to the tonnage of the vessel, but only of her tonnage as ascertained by her register, which is the foundation for all subsequent contracts in relation to that vessel. *Fesham v. McLean et al*

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VENIRE DE NOVO. *See* CRIMINAL LAW.

WAGES. *See* RECEIVER OF VOYAGE.

WAGES OF FISHERY SERVANT. *See* INSOLVENCY.

WAIVER. *See* LANDLORD AND TENANT.

WARD OF COURT. *See* INFANT.

WARRANT OF COMMITMENT. *See* HABEAS CORPUS.

WARRANTY. *See* VENDOR AND PURCHASER.

WATERS—

Public waters of the harbor of St. John's—Extension of wharves over same—Injury to neighboring wharf owner.

The owner of land abutting on the waters of the harbor and owning wharves extending over the said waters is justified in extending the said wharves, unless in doing so he works an injury to a neighboring proprietor. *Tessier v. O'Dwyer*

294

Waters of the harbor of St. John's; acquirement of easements in same—User for twenty years—Right to erect wharves over waters of Harbor.

Prima facie the waters of the harbor of St. John's is the property of the public, but private parties, by reason of their waterside property abutting on these waters, had acquired easements and certain rights over the same to which their title is as good as to the land abutting on the harbor. By the rights thus acquired wharves had been built and extended, and so long as such erection or extension did not become a public

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nuisance to the navigation of the harbor and did not injure the rights and properties of others, the owners of such properties have the right to extend their wharves as far as they please. *O'Dwyer v. Tessier* 278

Waters of the harbor of St. John's, acquirement of easements in same—What adverse possession of waters of harbor will bar the rights of the crown—What will bar the rights of a subject.

A party who erects a wharf under and over the waters of the harbor of St. John's, and occupies exclusively and adversely the soil and water for a period of over forty years, acquires a right to such soil and water easement as against the crown, and they become the private property of the occupant. A like occupancy of twenty years would suffice to bar the rights of a subject to the use of such soil and water. *Bown v. Kavanagh* 413

Waters of the harbor of St. John's—Acquirement of easements in same.

An exclusive and adverse occupancy of the soil and waters of the harbor of St. John's for twenty years creates an easement in the said soil and waters, but not against the Crown, and only to such waters and soil as is in front of his land. *Eagan v. Barron* 416

Waters of the harbor of St. John's—Acquirement of easements in same—When the extension of wharves over the public waters is a nuisance.

An exclusive and adverse occupancy of the said waters of the harbor of St. John's for twenty years creates an easement in the same, but not against the Crown. An extension of a wharf into the harbor of St. John's is a public nuisance, and may be abated at any time within forty years of its creation. *Eagan v. Barron and Fraser* 419

WAY—

Right of way—Uninterrupted user for twenty years—Dedication of way by tenant.

An uninterrupted user of the land of another for twenty years, with the knowledge of the owner, constitutes a right of way over the same. *Casey v. Hamlin* 285

WHARVES—EXTENSION OF. See **WATERS.**

WHARVES—RIGHT TO ERECT. See **WATERS.**

WIFE CARRYING ON BUSINESS. See **HUSBAND AND WIFE.**

WILL—

Inofficious character of—Importunity—Act of making will not originating with testator—Coercion—Undue influence.

In order that a will may be regarded as inofficious, that it is not consonant with the natural affections and moral duties, it

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must be shown that the parties affected by the acts of the testator in this respect were near relatives of his, for whom he was morally bound to provide; but even where a child is left unprovided for it does not render the will void, but merely requires stricter proof of the capacity of the testator.

It is no part of the testamentary law of England or of this country that the making of a will must originate with the testator, nor is it required that proof should be given of the commencement of such a transaction, provided that the deceased completely understood, adapted and sanctioned the disposition proposed to him, and that the instrument itself embodied such disposition. *In re the Will of Patrick Doyle* . . . 183

Lost will—Revocation of letters of administration—Proof necessary to establish contents of lost will.

Notwithstanding that the only witness called to support the contents of a lost will, was the principal legatee under the will, he being the party who drew the will and afterwards mislaid it, the Court held the will to be sufficiently proved, and admitted the same to probate. *In re the Will of William Callahan* 276

Lost Will—Proof of contents necessary to establish will and admit to probate.

The Court, in the absence of all proof of the execution of a will which has become lost, will not admit the same to probate. *In re the Will of John Hennebury* . . . 288

Lost will—Setting aside letters ad colligendum—Establishing lost will, proof necessary.

Where some years previous to the death of the testatrix she had made and executed her last will, but it did not appear that the will, which was found to be lost, was in existence at or about the time of her death. On an application to set aside letters ad colligendum and establish the lost will, the proof of its contents was given by the party having the custody of it previous to its loss, which was corroborated by another witness who swore to having heard of its contents from the testatrix.

*Held—*It is not necessary in order to establish a lost will that its contents should have been read and remembered by two witnesses. One witness is sufficient if corroborated on material points. *In re Will of Elizabeth Hays* . . . 227

Testamentary capacity—Sound and disposing mind, memory and understanding, what is?—Onus of proof, on whom lies.

On a proceeding to impeach and set aside a will, the ground relied upon was not evidence to establish that mental incapacity or aberration of the intellect, commonly described as insanity, but a condition of mind caused by habitual intemperance for some years before the execution of the will, which incapaci-

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tated the testator from performing that act ; and, as that was shown to be the ordinary condition of the testator, the onus of establishing mental capacity at the time of the execution of the will was thrown upon the party supporting the will.

Held—A party assuming to prove insanity in order to set aside a will is required to do so by clear and satisfactory proofs. The burden of proof rests upon the party who attempts to invalidate what purports to be a legal act. *In re Will of John Brocklebank*

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Will made by a married woman during life of husband—Acts of republication necessary to admit to probate.

Acts of republication, when established, have the same effect on the old will as if a new will were executed. *In re Will of Mary Doyle*

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WITNESS—

Privileged communications — Telegraph messages — Telegraph clerks, how far bound to disclose contents of messages to court as witnesses under subpoena.

Notwithstanding the oath administered to telegraph operators in the employ of the New York, Newfoundland and London Telegraph Comp'y, that they should not wilfully divulge or reveal the contents of any message passing over the line,

Held—They are bound, when subpoenaed as a witness, to give evidence and all facts within their knowledge touching the matter in question ; such messages are not in law privileged communications. *In the matter of the New York, Newfoundland and London Telegraph Company*

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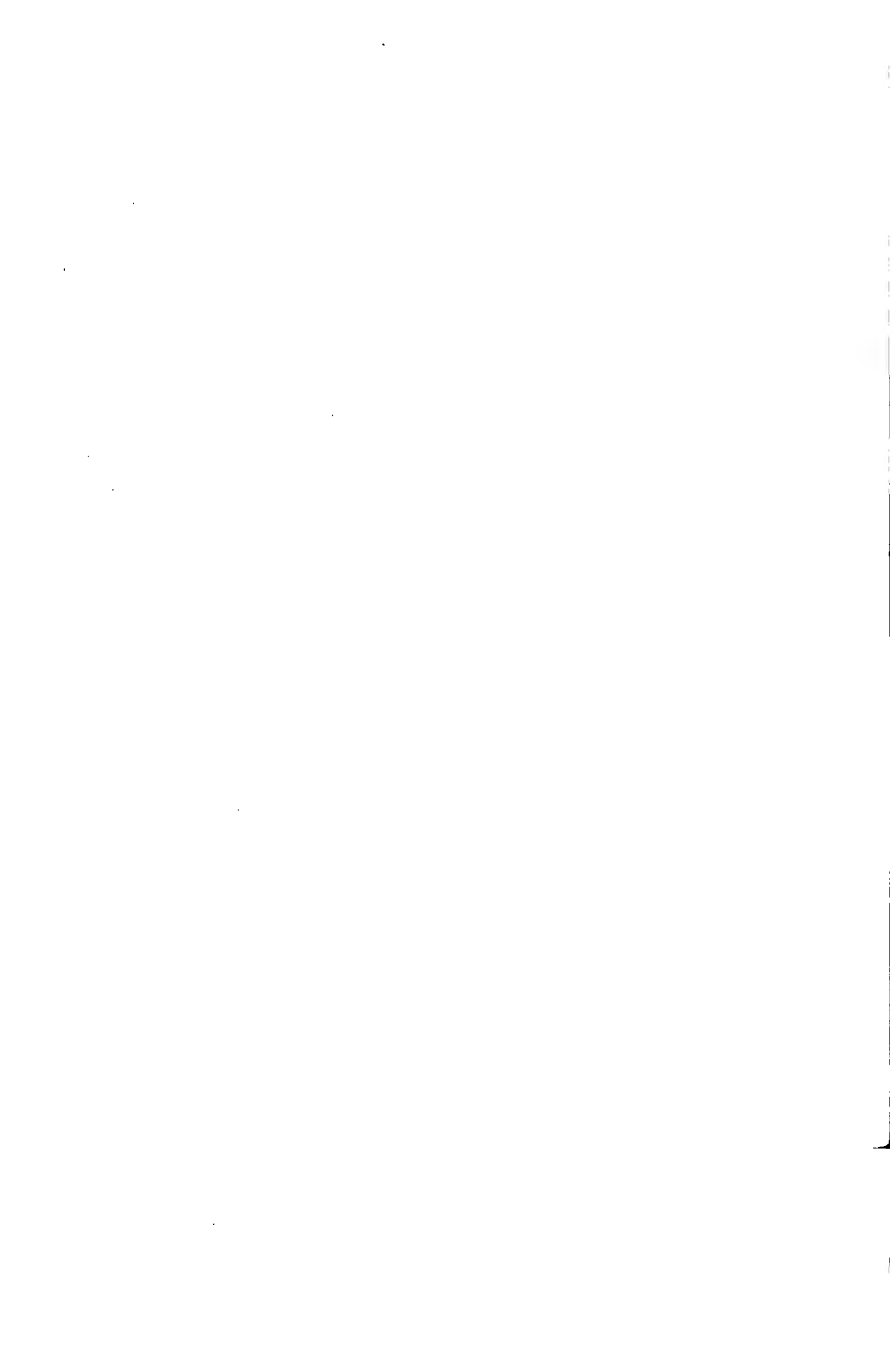
WITNESS, EXCLUSION FROM COURT. *See PRACTICE.*

WITNESS, PRIVILEGE OF. *See WITNESS.*

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WRONGFUL DISMISSAL. *See MASTER AND SERVANT.*





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